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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 148.

EMMA J. BLACKLOCK, MARY BLACKLOCK, AND HELEN R. BLACKLOCK, APPELLANTS,

vs.

JACOB SMALL AND ALEXANDER ROBERTSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED OCTOBER 22, 1884.

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1 THE UNITED STATES OF AMERICA, *District of South Carolina,* } *To wit:*

In Circuit Court, Fourth Circuit.

At a circuit court of the United States for *for* the fourth circuit, in and for the district of South Carolina, begun and holden at Columbia, in the district aforesaid, on the fourth Monday in November, 1879, before the judges of the said United States — for the district of South Carolina, holding said circuit court according to the form of the act of Congress in such cases made and provided, the following proceedings were had:

EMMA JANE BLACKLOCK and MARY BLACKLOCK, Complainants, *vs.* JACOB SMALL, ALEXANDER ROBERTSON, and HELEN ROBERTSON BLACKLOCK, Defendants. } In Equity.

Be it remembered that heretofore, to wit, on the 8th day of October, in the year of our Lord one thousand eight hundred and
2 seventy-nine, the said Emma Jane Blacklock and Mary Blacklock, residents of Savannah and citizens of the State of Georgia, impleaded the said Jacob Small, a resident of the city of Charleston and a citizen of the State of South Carolina; Alexander Robertson, a resident of Buncombe county, North Carolina, and a citizen of the State of North Carolina, and Helen Robertson Blacklock, a resident of the city of Charleston and a citizen of the State of South Carolina, in a bill for account, relief, &c., which bill is in the words and tenor following:

"*Bill.*"

UNITED STATES OF AMERICA, *District of South Carolina:*

In the Circuit Court, Fourth Circuit. In Equity.

To the judges of the circuit court of the United States for the district of South Carolina:

Emma Jane Blacklock and Mary Blacklock, residents of
3 Savannah and citizens of the State of Georgia, bring this their bill against Jacob Small, a resident of the city of Charleston and a citizen of the State of South Carolina; Alex. Robertson, a resident of Buncombe county, North Carolina, a citizen of the State of North Carolina, and Helen Robertson Blacklock, a resident of the city of Charleston and a citizen of the State of South Carolina.

And thereupon your oratrixes, Emma Jane Blacklock and Mary Blacklock, complain and say that on or about the 20th March, anno Domini eighteen hundred and sixty, John Freer Blacklock, the father of complainants, sold a house and lot in Bull street, in the city of Charleston, described in the deed conveying same as all that

lot of land, with the dwelling-house and buildings thereon, situated on the north side of Bull street, in the city of Charleston,
4 measuring in front on Bull street aforesaid one hundred and four $\frac{5}{12}$ feet, more or less, by a depth of two hundred and forty-eight $\frac{6}{12}$ feet or thereabouts on the west line, and two hundred and forty-five feet on the east or thereabouts on the back line, and also all that strip of land immediately adjoining said lot on the east side, measuring in width twelve feet or thereabouts, and extending from Bull street aforesaid to the lot lately of Daniel Huger, deceased, and also all that piece of land immediately adjoining the said first-mentioned lot to the westward, measuring in width ten feet or thereabouts and extending from Bull street by a depth of one hundred and ninety feet or thereabouts, and thence measuring for the line of the first-mentioned lot running westward 68 feet or thereabouts; thence running northward 58 feet or thereabouts; thence eastward on the north or back line of the first-mentioned lot
5 68 feet or thereabouts, abutting to the north on a burial ground; thence to the eastward partly on the lot of Daniel Huger and partly on the lot of Henry Buist, to the south on Bull street aforesaid, and to the west partly on the lot of Benjamin Lucas and partly on the lot of —— ——, which premises have been this day conveyed to the said Jacob Small, and now mortgaged to secure a portion of the purchase-money of the same for the sum of $16,000, of which $5,400 was paid in cash and the balance secured by a bond conditioned for ten thousand six hundred dollars, payable in one, two, and three years, said bond being secured by a mortgage of the premises of even date therewith.

And your oratrixes further show that on or about the — day of ——, anno Domini eighteen hundred and sixty, the said John F. Blacklock duly assigned the said bond and mortgage to Alex-
6 ander Robertson, in trust for the children of him, the said John F. Blacklock, who are your oratrixes, and the defendant Helen Robertson Blacklock, which said assignment was endorsed upon the bond and mortgage aforesaid now in possession of the said defendant, Jacob Small, and which said assignment your oratrixes expressly allege created in fact an executed trust, the trustee of which became the holder of a mere dry legal trust estate, with no other power than to hold the said bond and mortgage, collect the interest, and pay over the same to the *cestui que trusts*, and subject to a demand at any time from your oratrixes for a conveyance of the same to them, they being in equity absolute owners with their sister, Helen Robertson Blacklock, of said bond and mortgage; that during the continuance of the late war, and while the said State was associated with other of the Southern States, under the constitution known
7 as the constitution of the Confederate States, the said defendant, Jacob Small, pretended to pay the said bond as follows, to wit: On the 19th October, A. D. 1861, on account of principal, three thousand six hundred dollars ($3,600), and of interest $147; on the 4th April, A. D. 1862, on account of principal, two thousand dollars ($2,000), and of interest, four hundred and ninety dollars ($490); and on the tenth of April, A. D. 1862, the balance of principal, to

the amount of five thousand dollars ($5,000), and two hundred dollars on account of interest, said pretended payments having been made in the treasury notes of the Confederate States; and upon receipt of said Confederate treasury notes the said trustee, Alexander Robertson, satisfied the mortgage aforesaid and delivered up the said bond to said Jacob Small. And your oratrixes further shew

8 that the said trust was created for their benefit, the said children of John F. Blacklock aforesaid, and at the time of its creation your oratrixes were infants of tender years, and that shortly after the assignment of the said bond and mortgage to the trustee, Alexander Robertson, to wit, on the 13th day of May, A. D. eighteen hundred and sixty-one, as aforesaid, the father of your oratrixes, John Freer Blacklock, moved with them to England, in the Kingdom of Great Britain, and remained there till the close of the war; and your oratrixes were entirely ignorant that any attempt had been made to pay said bond whatsoever until they returned to said State, when they learned that their property had been sacrificed, and that the bond aforesaid, which had been given for the purchase of real estate of great value, had been delivered up to the defendant, Jacob Small, by reason of his pretended payments in valueless paper;

9 that they were greatly chagrined and disappointed on ascertaining these facts, as the trustee had never been authorized by them, or either of them, or any other proper authority, to receive the treasury notes of the said Confederacy in payment of said debt, and said Jacob Small had full notice of the said trust, because of the assignment on the bond and mortgage aforesaid, and because the receipts given him on account of his respective pretended payments thereon were signed by Alexander Robertson, trustee of the children of John B. Blacklock, and the mortgage is satisfied in a similar manner, to wit, "April 10th, 1862, the bond having been paid in full that this mortgage was given to secure, I declare the same satisfied and cancelled. Alexander Robertson, trustee of the children of John F. Blacklock." As will appear by reference to record of said mortgage in book —, page —, Registry of Mesne Conveyance, Charleston County.

10 And your oratrixes further say that the said trustee in accepting the said treasury notes, which, even under the constitution of the Confederate States aforesaid, were not a legal tender in the payment of debts, and which were unlawfully issued for the purpose of accomplishing the overthrow of the Government of the United States, and also at the time of reception by him were greatly depreciated, violated his duty and is guilty of a breach of trust, and is accountable to your oratrixes, and more especially for that he was in no way authorized to do so, either by your oratrixes or by any authority of any kind in said trusts contained, and that the said defendant, Jacob Small, in attempting to pay his debts justly incurred for very valuable property, in an illegal, unconstitutional, and depreciated currency, to a person holding a fiduciary capacity, he having full notice of the said trust, such person

11 being unauthorized to receive the same by law or by expressed or implied consent, which your oratrixes, being minors, were

unable to give under any circumstances, and have never given in any form, has failed to liquidate the said debt, and that the same is still due and unpaid to your oratrixes, and the satisfaction of the mortgage executed to secure the same by the said trustee without authority is inoperative and void, and that the lien thereof is still a subsisting lien under —, and in any event that the said defendant, Jacob Small, according to the well-established principles of equity jurisprudence, having gotten into his possession the property of your oratrixes without valuable consideration, with full notice of the trust which thereto attached, is liable to account fully to your oratrixes for the same, to wit, the amount due on the said bond, with interest according to law; and your oratrixes well hoped that no dispute would have arisen touch-
12 ing the claim of your oratrixes, but that said defendant- would have complied with the reasonable request of your oratrixes, made in pursuance of the statements aforesaid; but now, so it is, may it please your honors, that the said defendant-, combining and confederating with each other and with divers other persons, at present unknown to your oratrixes, whose names when known your oratrixes pray that they may be at liberty to insert with apt words to charge them as parties defendant hereto, and contriving how to wrong and injure your oratrixes, they, the said defendants, absolutely refuse to comply with such requests and at times allege and pretend, according to their respective positions, the said trustee, that in taking said bills and other pretended payments of said bond he acted only as other wise and discreet persons did and as he did himself
13 in the management of his own affairs, and that he was authorized to receive the same; also by authority of an act of the Legislature of the State of South Carolina permitting trustees to invest in Confederate securities, and the said Jacob Small — that the said bills and notes were the only currency circulating in said State at the time of the payment of aforesaid bond, and that he is not responsible if the said trustee chose to accept the same, and that, so far as he is concerned, the said bond is fully paid and satisfied. Wherefore your oratrixes charge the contrary and allege that the said trustee was unauthorized to receive such alleged and depreciated currency in payment of an obligation entered into when gold and silver were the only legal-tender currency of the United States and Confederate States; and that the defendant, Jacob Small, did not and could not discharge a debt of such character by a transfer to your oratrixes' trustee, who had no authority to receive them,
14 of illegal and depreciated currency, payable years after the contingent establishment of the sovereignty and independance of the Confederate States of America, which said notes, even under the constitution of the said Confederate States, were not a legal tender, said defendant Jacob Small, moreover, at the time of the said payment, having full notice of the said trust by reason of the signatures of the said Alexander Robertson, trustee, upon receipt for each payment and upon the satisfaction of the mortgage as aforesaid.

To the end, therefore, that the said defendants and their confederates may answer as aforesaid, and that the said Alexander Robertson, trustee, may account to your oratrixes for his administration of

the said trusts, and that the delivery of Confederate treasury notes as aforesaid to said trustee by said Jacob Small, pretend-
15 ing to be in satisfaction of said bond, may be disallowed, and that the satisfaction of the said mortgage securing said bond by said trustee be annulled and the mortgage be re-established and declared a subsisting lien on the said land, and that the said Jacob Small be ordered to deliver up the said bond and mortgage to your oratrixes, and that your oratrixes have leave to ask for a decree for the payment to them by the said Jacob Small of the amount proved due to them and for a sale of the mortgaged premises, and in the meantime and during the pendency of the suit said Jacob Small be enjoined from selling, mortgaging, or otherwise encumbering or disposing of said premises, and that your oratrixes may have such other and further relief as the nature of this case may require and to your oratrixes may seem meet—

16 May it please your honors to grant unto your oratrixes a writ of *subpœna ad respondendum*, to be direc- to the said Alexander Robertson and Jacob Small and the said Helen Robertson Blacklock, commanding them and each of them, at a certain day and under a certain penalty therein to be inserted, personally to be and appear before this court, and then and there to answer the premises and to stand — and abide by and perform such order, direction, or decree as shall be meet thereto.

And your oratrixes shall ever pray, &c.

EMMA JANE BLACKLOCK.
MARY BLACKLOCK.

STATE OF GEORGIA,
County of Chatham, Southern District of Georgia:

Personally appeared before me Emma J. Blacklock & Mary Blacklock, who, being duly sworn, says, each for herself, that the
17 above complaint is true of her own knowledge, except as to matters therein stated on information & belief, & as to those matters she believes it to be true.

EMMA JANE BLACKLOCK.
MARY BLACKLOCK.

Sworn to before me this 6th day of Oct., 1879.

A. N. WILSON,
U. S. Comm'r.

18 And on the 8th day of October, 1879, came into court the complainants, Emma J. Blacklock & Mary Blacklock, by their solicitor, B. H. Rutledge, and filed the following subpœna, which subpœna is in the words and tenor following:

"*Subpœna.*"

UNITED STATES OF AMERICA,

Fourth Circuit, State of South Carolina:

The President of the United States of America to Jacob Small, a resident of the city of Charleston & a citizen of the State of South Carolina; Alexander Robertson, a resident of Buncombe county, North Carolina, & a citizen of the State of North Carolina; and Helen Robertson Blacklock, a resident of the city of Charleston & a citizen of the State of South Carolina:

19 You are hereby strictly commanded and firmly enjoined that, all manner of excuses being laid aside, you be and appear before the judges of the circuit court of the United States for the district of South Carolina, at Charleston, on the first Monday of November, twenty days after the service thereof, then and there true and perfect answer to make, upon your corporal oath, on the Holy Evangelists, to all such matters as shall be objected against you in the bill of complaint of Emma Jane Blacklock and Mary Blacklock, residents of Savannah and citizens of the State of Georgia; and also that you do, on the rules day next immediately after the day appointed and expressed, file or cause to be filed in the registry of said court your plea, answer, or demurrer to the said bill of complaint. Hereof fail not under the pain of one hundred pounds.

Given under the seal of the said court.

[SEAL]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

20 Witness the Honorable Morrison R. Waite, Chief Justice of the United States of America, at Charleston, in South Carolina, district aforesaid, the 8th day of October, in the year of our Lord one thousand eight hundred and seventy-nine, and *and* in the 104th year of the sovereignty and Independence of the United States of America.

B. H. RUTLEDGE,
Complainants' Solicitor.

"MEMORANDUM."—The defendants above mentioned are hereby notified & required to enter their appearance in the above cause in the clerk's office of the United States circuit court for the district of South Carolina on or before the first Monday of November, 1879, or the bill will be taken *pro confesso* against them.

B. H. RUTLEDGE,
Compl'ts' Sol'r.

Entered in my office, "Civil Docket," page 174, Oct. 8th, 1879.

R. M. WALLACE,
U. S. Marshal.

Return of Service.

CHARLESTON, S. C., *Oct'r 8th*, 1879.

21 I hereby certify that I have this day served a copy of the within *sub. ad re.* on Jacob Small personally, in the city of Charleston, S. C., and left the same with him.

HENRY GOURDIN, JR.,
Special Deputy U. S. Marshal.

Sworn to before me.

J. E. HAGOOD,
C. C. C., U. S. Dist. of S. C.

"*Appearance.*"

And on the 3rd day of November, 1879, the defendant, Jacob Small, by his solicitors, Simons & Siegling, came into the court and filed their appearance for the defendant, Jacob Small.

And on the 1st day of December, 1879, came into court the defendant, Jacob Small, by his solicitors, Simons & Siegling, and filed the following plea, which plea is in the words and tenor following:

"*Plea.*"

22 THE UNITED STATES OF AMERICA,
District of South Carolina:

In the Circuit Court, Fourth Circuit. In Equity.

The plea of Jacob Small, a citizen of the State of South Carolina, who is impleaded with Alexander Robertson and Helen Robertson Blacklock, to the bill of complaint of Emma J. Blacklock and Mary Blacklock, who are therein styled as being "of Savannah, Georgia, and citizens of the State of Georgia."

To the judges of the circuit court of the United States for the district of South Carolina:

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said bill of complaint mentioned and contained to be true in such sort, manner, and form as the same are therein set forth and alleged, doth plead thereunto, and for plea to the said bill says that this honorable court cannot

23 have cognizance of this suit, because the said plaintiffs, Emma J. Blacklock and Mary Blacklock, are not in fact citizens of the State of Georgia, but are citizens of the State of South Carolina, and were citizens of the State of South Carolina at the time of exhibiting their said bill of complaint, and the said defendant was a citizen of the said State of South Carolina at the time of the exhibiting the said bill of complaint and now is a citizen of the said State of South Carolina, whereby this honorable court can have no jurisdiction in the premises.

Wherefore this defendant doth plead the said want of jurisdiction in bar to the said complainants' bill, and prays judgment of this

honorable court whether he should be compelled to make any further answer to the complai-nts' said bill of complaint, and prays to be hence dismissed with his reasonable costs and charges in this behalf wrongfully sustained.

SIMONS & SIEGLING,
Def'ts' Solicitor-.

24 We certify that in our opinion the foregoing plea of Jacob Small, defendant, to the bill of complaint of Emma J. Blacklock and Mary Blacklock against the said Jacob Small, who is impleaded with Alexander Robertson and Helen R. Blacklock, is well founded in law and proper to be filed in the above case.

SIMONS & SIEGLING,
Def'ts' Solicitor-.

THE UNITED STATES OF AMERICA, *District of South Carolina:*

Jacob Small, being duly sworn, deposeth and saith that he is a defendant in the above-entitled case; that he has read the foregoing plea and knows the contents thereof; that the same is not interposed for the purpose of delaying said suit or any proceedings therein; that he is informed and believes that the said complainants, Emma J. Blacklock and Mary Blacklock, are not citi-
25 zens of the State of Georgia, but are citizens of the State of South Carolina, as alleged in the said plea, and that the said plea is true to his own knowledge, except to those matters therein stated on information and belief, and to these he believes it to be true.

JACOB SMALL.

Sworn to before me this 24th day of Nov'r, 1879.
CHAS. LITSCHGI,
Notary Public.

And on the 2nd day of January, 1880, came into court the complainants, by their solicitor, B. H. Rutledge, and filed the following replication, which replication is in the words and tenor following:

"Replication."

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

EMMA J. BLACKOCK & MARY BLACKLOCK, Complainants,
26 *vs.*
JACOB SMALL *et al.*, Defendants. } In Equity.

The replication of Emma J. Blacklock & Mary Blacklock, complainants, to the plea of Jacob Small, one of the defendants.

These repliants, saving & reserving unto themselves all & all manner of advantage of exception to the manifold insufficiencies of the said plea, for replication thereunto say that they will aver &

prove their said bill to be true, certain, & sufficient in law to be answered unto, and that the said plea of the said defendant is uncertain, untrue, & insufficient to be replied unto by these repliants, without this, that any other matter, cause, or thing whatsoever in the said plea contained material or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true; all
27 which matters & things these repliants are and will be ready to aver & prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

EMMA J. BLACKLOCK.
MARY BLACKLOCK.

B. H. RUTLEDGE,
Compl'ts' Sol'r.

STATE OF GEORGIA, *Chatham County:*

Personally appeared before me Emma Jane Blacklock, who, being duly sworn, says that the above replication is true of her own knowledge, except as to matters therein stated on information & belief, & as to those matters she believes it to be true.

EMMA JANE BLACKLOCK.

Sworn to before me this 31st day of December, 1879.
[SEAL.] A. N. WILSON,
U. S. Comm'r.

And on the 20th day of May, 1880, came into court the
28 complainants, Emma J. Blacklock & Mary Blacklock, by their solicitor, B. H. Rutledge, and filed the following notice & affidavits, which notice & affidavits are in the words and tenor following:

"*Notice & Affidavits.*"

UNITED STATES OF AMERICA, *South Carolina District:*

In the Circuit Court.

EMMA J. BLACKLOCK *et al. vs.* JACOB SMALL *et al.*

To Messrs. Simons & Siegling, solicitors for defendant, Jacob Small:

Please take notice that upon the accompanying affidavits and such others as may be then presented I shall move in the circuit court, at Charleston, on the 20th day of May, 1880, at ten o'clock or as soon thereafter as counsel can be heard, before the judges
29 of the said court, for the grant of the order, of which a copy is enclosed, setting down the plea in abatement, filed in this cause for argument, and, in case the said order be refused, I shall then at the same time and place move before the said judges to grant the order, of which a copy is also enclosed, enlarging the time for taking testimony upon the matters involved in the said plea in abatement.

15 April, 1880. B. H. RUTLEDGE,
Compl's' Sol.

THE UNITED STATES OF AMERICA, *District of South Carolina:*

In the Circuit Court. In Equity.

EMMA JANE BLACKLOCK and MARY BLACKLOCK

versus

JACOB SMALL, AL-X. ROBERTSON, and HELEN ROBERTSON BLACKLOCK.

Personally appeared before me Benjamin H. Rutledge,
30 solicitor on record in above cause, who makes oath and says that he is solicitor of record in the above cause; that Mr. Young represented him in the examination of Alfred Chisholm at Savannah as a witness in the above cause in behalf of the defendant in reference to questions raised by the plea in abatement filed by said defendant; that upon his return deponent asked him what Chisholm's testimony was, and was told its substance; that he then asked whether the other side had closed, and he (Young) answered "No; they have it under consideration and will notify us when they make up their minds;" that deponent awaited the notification until the time drew near for the session of the said court on 20 May, at which he desired this preliminary matter disposed of; that on the 19th April he wrote a note on the following terms to Mess. Simons & Siegling, defendants' solicitors:

31 DEAR SIRS: Will you kindly say when it will suit you to close your evidence in this case? Our clients are anxious to have the trial of the plea in abatement at this term of the court. Please let us know at once.

Very respectfully,

(Signed) RUTLEDGE & YOUNG.

That on the following day, April 20th, he received a reply in these terms:

Yours of the 19 inst. just received, and in reply we beg leave to say that we consider the testimony on the plea as closed.

Very truly yours,

(Signed) SIMONS & SIEGLING.

That deponent, in view of the premises, construed this to mean that these gentlemen had closed their case, so far as the testimony they intended to introduce was concerned, and immediately summoned his witnesses from Savannah; that the motion insisting that the time for taking testimony under the 69 rule of court had expired, & that no further testimony could be taken in the
32 cause, was a complete surprise to deponent, induced by the circumstances above set forth.

And further deponent saith not.

B. H. RUTLEDGE.

Sworn to and subscribed before me this 15th day of ——, 1880.

T. MOULTRIE MORDECAI,

A Notary Public for South Carolina.

UNITED STATES OF AMERICA, *South Carolina District:*

In the Circuit Court. In Equity.

EMMA J. BLACKLOCK *et al. vs.* JACOB SMALL *et al.*

Personally appeared before me Emma J. Blacklock, and makes oath that her testimony is, as she is advised, material to the decision of the plea in abatement filed in said cause by the defendant, Jacob Small; that her testimony will contradict and deny the testi-
33 mony given in said cause by Alfred Chisolm, and will affirm that before the filing of the bill in this cause she changed her domicil to Savannah, Georgia, and made her permanent home in that State; that deponent further saith that if by the action of her counsel, inadvertant or otherwise, she is precluded from putting in the evidence she is prepared to offer she will be greatly prejudiced, as, besides her own evidence, she is prepared to introduce other witnesses, whose testimony is contradictory of that given by Mr. Chisolm, and fully corroborative of the statement she has already made.

EMMA J. BLACKLOCK.

Sworn to before me this 15 May, 1880.

[SEAL.] JENNINGS W. PERRY,
Not. Pub.

34 UNITED STATES OF AMERICA, *South Carolina District:*

In Circuit Court. In Equity.

EMMA J. BLACKLOCK *et al. vs.* JACOB SMALL *et al.*

Personally appeared before me Mary Blacklock and makes oath that her testimony is, as she is advised, material to the decision of the plea in abatement filed in said cause by the defendant, Jacob Small; that her testimony will contradict and deny the testimony given in said cause by Alfred Chisolm and will affirm that before the filing of the bill in this cause she changed her domicil to Savannah, Georgia, & made her permanent home in that State; that deponent further saith that if by the action of her counsel, inadvertant or otherwise, she is precluded from putting in the evi-
35 dence she is prepared to offer she will be greatly prejudiced, as besides her own evidence she is prepared to introduce other witnessess whose testimony is contradictory of that given by Mr. Chisolm and fully corroborrative of the statement she has already made.

MARY BLACKLOCK.

Sworn to before me this 15 May, 1880.

[SEAL.] JENNINGS W. PERRY,
Not. Pub.

And on the 25th day of May, 1880, came into court the complainants, by their solicitor, B. H. Rutledge, and obtained the following order of reference to special master, which order of reference is in the words and tenor following:

"*Order of Reference.*"

UNITED STATES OF AMERICA, *South Carolina District:*

In the Circuit Court. In Equity.

36 EMMA J. BLACKLOCK *et al. vs.* JACOB SMALL *et al.*

The affidavit of B. H. Rutledge, complainants' solicitor, and of the complainants having been heard, it is, on motion of B. H. Rutledge, ordered that the time for taking the testimony on the plea in abatement in this cause be enlarged, & that the evidence on behalf of the defendant, Jacob Small, the actor in this plea, shall be taken on or before the 20th day of June, 1880, & the evidence on behalf of the complainants shall be taken on or before the 15 day of July, 1880, & that the evidence in reply on behalf of the said Jacob Small shall be taken on or before the 4 day of August, 1880.

It is further ordered that either party be allowed to take testimony, under section 863 of the Revised Statutes of the United States, upon ten days' notice of their intention so to do.

37 It is further ordered that E. M. Seabrook, Esq., be appointed special master to take the testimony to be offered under this order.

The special reason for the appointment of Mr. E. M. Seabrook as special master aforesaid is that he is a fit & proper person to be so appointed. It is further ordered that the complainants pay the costs of this term & of this motion.

May 25, 1880.

HUGH L. BOND,
C't Judge.

And on the 1st day of July, 1880, came into court the complainants, by their solicitor, B. H. Rutledge, and filed the following "Notice to take testimony in Georgia," which notice is in the words and tenor following:

"*Notice.*"

UNITED STATES OF AMERICA, *District of South Carolina:*

In the Circuit Court. In Equity.

38 EMMA J. BLACKLOCK *et al. vs.* JACOB SMALL *et al.*

Please take notice that on the 12th day of July, 1880, at four o'clock p. m., will be taken, on behalf of the complainants herein, before L. H. De Montmollin, Esq., who is a commissioner of the circuit court of the United States for the southern district of Georgia, at his office in the city of Savannah, county of Chatham and State of Georgia, the deposition, *de bene esse,* of Joseph Hull, W. W. Mackall, and G. M. Soul, Esquires, witnesses to be examined on the part of said complainants under section 863, Revised Stat. of the United States, at which time and place you are entitled to be present and cross-examine the said witnesses living in the said city of Savan-

nah, at a distance of more than one hundred miles from the place where the trial of this action is to be had, and should such ex-
39 amination of said witnesses not be concluded on the day herein named then their examination will be taken on each succeeding day (Sundays excepted), at the same time and place, before the said H. L. de Montmollin, Esq., commissioner as aforesaid, until such examination shall have been completed.

B. H. RUTLEDGE,
Complain-t- Solicitor.

Served on us June 30th, 1880.

SIMON & SIEGLING.

And on 16 day Ap'l 1881, came into court the complainants, by their solicitor, B. H. Rutledge, and filed the following order of reference, which order of reference is in the words and tenor following:

"Order of Reference."

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

EMMA JANE BLACKLOCK *et al. vs.* JACOB SMALL *et al.*

40 On motion of B. H. Rutledge, solicitor for complainants, it is ordered—

I. That the defendants in this case forthwith file their answer or demurrer, and in case they do not file such on or before the 16th May, 1881, the complainants be authorized to take the bill *pro confesso* against such one or more as may not have answered; and if there be no demurrer filed—

II. That there be allowed to the complainants forty days from the said 16th day of May in which to take testimony on their behalf.

III. That thereafter thirty days be allowed to the defendants in which to take testimony on their behalf.

IV. That the plaintiff have forty days from the close of the last said period in which to present the testimony on their behalf in reply.

V. That E. M. Seabrook, Esq., be appointed special master
41 in this cause to take such testimony.

VI. That in the taking of the testimony to be offered under this order the special master be allowed to employ a sworn stenographer, and the expense of the same shall be taxed as part of the costs of this case.

VII. That either party be allowed to take testimony under section 863, Revised Statutes of the United States, upon five days' notice of their intention so to do.

The special reason for the appointment of Mr. Seabrook as master is that all parties have requested that it might be done.

But before proceeding any further in the cause the plaintiff shall give security for costs in the sum of two hundred dollars.

April 16th, 1881.

HUGH L. BOND,
C't Judge.

42 And on the 16th day of April, 1881, came into court the complainants, Emma Jane Blacklock & Mary Blacklock, by their solicitors, Rutledge & Young, and obtained the following order, which order is in the words and tenor following:

"*Order Overruling Plea to Jurisdiction.*"

EMMA JANE BLACKLOCK *et al.*, Compl'ts,
against
OLNEY HARLESTON.

SAME *vs.* JACOB SMALL.

Argument on the plea to the jurisdiction in these causes having been heard, it is ordered & decreed that the same be overruled.
April 16, 1881.

HUGH L. BOND,
C't Judge.

43 And on the 16 day of May, 1881, came into court the defendant, Jacob Small, by his solicitors, Simons & Siegling. and filed the following answer, which answer is in the words and tenor following:

"*Answer.*"

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court. In Equity.

The answer of Jacob Small, defendant, to the bill of complaint of Emma Jane Blacklock and Mary Blacklock.

This defendant, now and at all times hereafter, saving and reserving to himself all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainants' bill of complaint contained, for answer thereunto or unto so much
44 thereof as he is advised is material for him to answer to, answering, says:

This defendant admits that on or about the twentieth day of March, in the year one thousand eight hundred and sixty, John Freer Blacklock, the father of complainants, sold the house and lot of land in the bill of complaint described to this defendant for sixteen thousand dollars, of which five thousand four hundred dollars was paid in cash and the balance secured by a bond conditioned for ten thousand six hundred dollars, payable in one, two, and three years, said bond — secured by a mortgage of the premises of even date with said bond; that on the nineteenth day of March, 1861, he paid to the said J. F. Blacklock seven hundred and forty-two dollars, being one year's interest on said bond.

This defendant admits that afterwards the said John F. Blacklock assigned the said bond to Alexander Robertson, in trust
45 for the children of him, the said John F. Blacklock, who are complainants, and the defendant Helen Robertson Blacklock,

which said assignment was endorsed on the said bond in the following words:

For value received, I hereby assign, transfer, and set over all my right, title, and interest in this bond to Alexander Robertson, in trust for children of J. F. Blacklock.

(Sig.) J. F. BLACKLOCK.

Witness:

(Sig.) GEO. W. MOODY.

And a similar assignment was written on the mortgage, but not executed by the said John F. Blacklock, which said bond and mortgage are now in the possession of this defendant.

This defendant denies that he pretended to pay the said bond or any part of it, as alleged in the complaint, but avers that he did pay the said bond as follows, to wit: On the nineteenth day
46 of October, one thousand eight hundred and sixty-one, he paid on account of the principal three thousand six hundred dollars and of interest one hundred and forty-seven dollars; on the fourth day of April, one thousand eight hundred and sixty-two, he paid on account of principal two thousand dollars and of interest four hundred and ninety dollars, and on the tenth day of April, one thousand eight hundred and sixty-two, he paid the balance of principal to the amount of five thousand dollars and two hundred dollars for interest, and on such payment the said Alexander Robertson satisfied the mortgage aforesaid and delivered up the said bond to this defendant, but this defendant denies that the said payments or any of them were made in the treasury notes of said Confederate States, as alleged in the bill of complaint.

This defendant is informed and believes and alleges that the complainant, Emma Jane Blacklock, attained the age of twenty-
47 one years on the nineteenth day of November, one thousand eight hundred and sixty-one; the complainant, Mary Blacklock, attained the age of twenty-one years on the twenty-eight day of December, one thousand eight hundred and sixty-five, and the defendant, Helen Robertson Blacklock, attained the age of twenty-one years on the twenty-ninth day of August, one thousand eight hundred and sixty-nine.

This defendant is informed and believes and alleges that the said John R. Blacklock at or about the time stated in the bill of complaint did go with the said complainants and the defendant, Helen Robertson Blacklock, to England, in the Kingdom of Great Britain, but only temporarily, and not with the intention of removing his domicil from the State of South Carolina or of renouncing his citizenship in the said State, and that he returned
48 to the city of Charleston, in the said State, where he had always resided with his family and household, of which the complainants and the defendant, Helen Robertson Blacklock, constituted a part, in the year one thousand eight hundred and sixty-six, and the said city continued to be their place of residence until about the second day of October, one thousand

eight hundred and seventy-nine, when the complainants went to Savannah, in the State of Georgia, leaving their father and said sister, Helen Robertson Blacklock, still residing in Charleston; that this defendant is ignorant when the complainants first learned that the said bond had been paid, and prays strict proof thereof, but this defendant alleges that they knew of the same previous to the seventeenth day of November, one thousand eight hundred and sixty-nine, and that from that time and until the commencement of this suit the said plaintiffs and the defendant, Helen Robertson
49 Blacklock, have acquiesced in the receipt of said payment by the said Small, and this defendant denies that the said bond was paid in valueless paper, as characterized in the said bill of complaint.

And this defendant denies all unlawful combination and confederacy in said bill charged, without that in any other matter or thing material or necessary for this defendant to make answer unto, not herein or hereby well and sufficiently answered unto, confessed or avoided, traversed or denied, is true to the knowledge and belief of this defendant.

This defendant denies that the complainants have any cause of action against him, and alleges that the pretended claim of the complainants is a State claim.

And this defendant, further answering, alleges that the said pretended claim of the complainants against him is barred by the statute of limitations, of which this defendant prays he may have the benefit as fully and in all respects as if the same were especially pleaded.

50 And this defendant, having fully answered the bill of complaint, prays to be hence dismissed with his costs and charges in this behalf sustained.

SIMONS & SIEGLING,
Def'd'ts' Sol'rs.

LORD & INGLESBY, *Of Counsel.*

THE UNITED STATES OF AMERICA, *District of South Carolina:*

Personally appeared before me Jacob Small, who, being duly sworn, says that the foregoing answer is true to his own knoweledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

JACOB SMALL.

Sworn to before me this sixteenth day of May, 1881.
[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

51 And on the 23 day of May, A. D. 1881, came into court the defendant, Alexander Robertson, by his solicitor, H. F. Young, and filed the following answer, which answer is in the words and tenor following:

"*Answer.*"

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court. In Equity.

EMMA J. BLACKLOCK *et al. vs.* JACOB SMALL *et al.*

The defendant, Alex. Robertson, saving and reserving to himself all and all manner of advantage and exception to the manifold errors and uncertainties in the said bill of complaint contained, nevertheless, for answer thereto, saith:

1. That he admits the statements contained in the bill as to the sale of the premises therein described to Jacob Small, and
52 that the purchase-money bond of the said Jacob Small for same, $10,600, secured by a mortgage of said premises, were assigned to him "in trust for the children of John F. Blacklock."

2. That there was no other instrument or declaration of trust than the said assignment, and he is ignorant as to what were the special legal relations between him and them other than that he considered himself their trustee as aforesaid.

3. That Mr. Small offered to pay the bond, principal and interest, as well as defendant remembers, in Confederate currency or by checks on one of the banks of the city of Charleston, which banks had suspended specie payments on or about Nov., 1860, and had in September, 1861, given notice that all credits would be given and payable only in currency, in which Confederate treasury notes were included. Said payments were made in the way and at the times set forth in said bill, the last payment being made some time
53 in April, 1862, thus paying the said bond before its maturity many months.

4. That defendant accepted said currency in liquidation of said bond and satisfied the said mortgage and invested the funds so received in bonds of the Confederate States Government.

5. That the plaintiffs, who were in England at the time, had no notice from him of what he had done, nor did they know of the transaction between him and Small until after their return to this country, some time in 1866 or 1867.

6. That he had no other power in the premises except what may have belonged to him from the trust or agency aforesaid; that shortly after the discovery of the above facts the plaintiffs called upon this defendant to institute proceedings to recover their rights in the premises, insisting that the payments made by the said Jacob Small were invalid, and that this de-
54 fendant was not justified in receiving Confederate currency or checks on suspended banks in payment of the bond due to them; that this defendant declined to do so then and still refuses, considering himself estopped from further claim against the said Jabob Small without prejudice to any claim which the plaintiffs may have against him, the said Jacob Small.

And this defendant, having fully answered, prays to be hence dismissed with his reasonable costs and charges in this behalf sustained.

H. E. YOUNG,
Def'd'ts' Sol'r.

STATE OF NORTH CAROLINA, *County of Buncombe:*

Alexander Robertson, one of the defendants in this action, being duly sworn, says the above answer is true of his own knowledge, except as to matters therein stated on information and belief, & as to those matters he believes it to be true.

55 ALEX. ROBERTSON.

Sworn to before me this 18th day of May, 1881.

E. W. HERNDON,
Clerk Superior Court Buncombe C'ty.

And on the 23 day of May, A. D. 1881, came into court the complainants, Emma Jane Blacklock and Mary Blacklock, by their solicitor, B. H. Rutledge, and filed the following replication, which replication is in the words and tenor following:

"*Replication.*"

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court. In Equity.

EMMA JANE BLACKLOCK *et al. against* JACOB SMALL *et al.*

The replication of Emma Jane Blacklock and Mary Black-
56 lock, complainants, to the answer of Jacob Small.

These repliants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver and prove their said bill to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other thing or matter whatsoever in the said answer contained material or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

B. H. RUTLEDGE,
Sol'rs of Compl'ts.

57 And on the 28th day of May, 1881, came into court the defendant, Helen Robertson Blacklock, by her solicitor, H. E. Young, and filed the following answer, which answer is in the words and tenor following:

"*Answer.*"

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court. In Equity.

EMMA JANE BLACKLOCK *et al. against* JACOB SMALL *et al.*

The answer of Helen Robertson Blacklock to the bill of complaint of Emma Jane Blacklock and Mary Blacklock against Jacob Small *et al.*

This defendant, now and at all times hereafter, saving and re-
reserving to herself all manner of benefit and advantage of
58 exception to the many errors and insufficiencies in the com-
plainants' bill of complaint contained, for answer thereunto, or so much thereof as she is advised is material for her to answer to, answering, says—

That she admits all the statement of facts in said bill contained to be correct to the best of her knowledge and belief, and especially in reference to the sale of the house in Bull street to Jacob Small by her father, John F. Blacklock, the assignment of the land and mortgage for the credit portion of the purchase-money thereof to Alexander Robertson in trust for her sisters and herself, and the acceptance of said Alexander Robertson, trustee, as aforesaid of Confederate treasury notes or bills of banks that had suspended specie payments, and paid all demands upon them in such currency only — in — in satisfaction of said bond and mortgage.

59 This defendant, further answering, says that during the four years of war, known as the Confederate war, she was absent from the United States, a minor, and both ignorant of her rights and incapable of asserting them, and that she did not reach the age of twenty-one years until 29th August, 1869; that she returned to South Carolina with her father and sisters some time in the year 1866, and united with her sisters in their efforts to recover their property, which had been lost to them by the illegal acts of their uncle and trustee, immediately upon the discovery of the transactions between himself and said Jacob Small.

That they first sought relief in the courts of the State of South Carolina, but discontinued the suit before judgment, because of a decision in the highest court of State of South Carolina, viz., the
case of Mayer *vs.* Mordecai, reported in 1st vol. So. Ca. Rept.,
60 N. S., page 383, after which decision it was useless to prose-
cute their claim in the courts of said State; that at the time of said discontinuance there was then pending in the United States court a case, entitled Carson *vs.* Robertson, subsequently reported in 9th Otto, 99, Supreme Court reports of the United States, involving the same principles as the present case, and upon consultation with their legal advisers this defendant and her sisters, the complainants, resolved to await its determination, and shortly after the announcement of the decision in said cause the present suit was begun in the courts of the United States.

And this defendant, further answering, says that the trust upon which the said Alexander Robertson held the bond and mortgage aforesaid for this defendant and her sisters was a simple trust, under which he was "a mere passive depository of the estate," and
61 his duty consisted only in collecting the interest and principal upon said bond when it became due in lawful money of the United States and paying over the principal to his *cestui que* trusts, as soon as each, respectively, attained twenty-one years, her sister Emma having become of age on the 19th of November, 1861, and Mary on the 28th December, 1865, and that his powers as trustee were correlative with his duties and extended no further; that the real and actual interest in said property was in this defendant and her sisters, and the attempted discharge of his obligation by said Jacob Small in paper money not legal tender and of little or no value, and the acceptance of the same in satisfaction of said debts by Alexander Robertson aforesaid were illegal and futile acts and the same were absolutely null and void and without legal effect, and that the said bond and mortgage are as if no such attempted pay-
62 ments had been made or satisfaction entered upon them, and are still the property of this defendant and her sisters, and by the law of South Carolina a bond debt is not barred until twenty years have elapsed after maturity, or a valid payment thereafter. In case of the bond aforesaid, in view of its terms and of the suspension of the statute of limitations in this State during the late war, not until the 21 December, 1886.

And this defendant, further answering, says she joins in the prayer of the complainants that the said pretended payments of the bond mentioned in the pleadings, by Jacob Small to Alexander Robertson, trustee, be declared null and void, together with the satisfaction entered upon said mortgage by virtue of said pretended payments, and that the said bond and mortgage be declared valid and subsisting obligations of the said Jacob Small to the said Alexander Robertson, trustee, as the trustee of a simple trust
63 for the absolute use and benefit of this defendant and the complainants, her sisters; that the said Jacob Small be decreed to pay the amount of money secured by the said bond and mortgage, with all arrears of interest, to this defendant and the complainants, and that she and they have such other and further relief as the nature of the case may demand and to this court shall seem meet — proper in the premises, and that she be hence dismissed with costs.

H. E. YOUNG,
Def'd'ts' Sol'r.

STATE OF GEORGIA, *Cobb Co.:*

Personally appeared before me Helen Robertson Blacklock, who, being duly sworn, says that the foregoing answer is true to her own knowledge, except as to those matters therein stated on information and belief, and as to those matters she believes it to be true.

64 HELEN ROBERTSON BLACKLOCK.

Sworn to before me this 25th day of May, A. D. 1881.
[SEAL.]
A. Y. LEAKE,
N. P., Cobb Co., Geo.

And on the 30th day of May, 1881, came into court the complainants, Emma Jane Blacklock and Mary Blacklock, by their solicitor, B. H. Rutledge, and filed the following replication, which replication is in the words and tenor following:

Replication.

UNITED STATES OF AMERICA,
South Carolina District, Fourth Circuit:

EMMA JANE BLACKLOCK *et al. vs.* JACOB SMALL *et al.*

The replication of Emma Jane Blacklock and Mary Blacklock, complainants, to the answer of Alexander Robertson and Helen Robertson Blacklock.

65 These replicants, saving and reserving unto themselves all and all manner of exception to the manifold insufficiencies of the said answers, for replications thereunto say that they will aver and prove their said bill to be true, certain, and sufficient in law to be answered unto, and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied to by these replicants, without this, that any other matter or thing whatsoever in said answers contained material or effectual in law to be replied unto, confessed and avoided or denied is true; all which matters and things these replicants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

B. H. RUTLEDGE,
Compl'ts' Sol'r.

66 *Trial of Cause.*

And at the April term, 1883, of the said court this cause came up for hearing before the Honorable Hugh L. Bond, circuit judge.

The bill, pleadings, and testimony *was* read to the court.

Argument by Mr. Rutledge on behalf of complainants, and by Mr. Young on behalf of Mr. Alexander Robertson, and by Mr. James Simons and Samuel Lord on behalf of the defendant, Jacob Small. The court took the case under advisement.

67 UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

EMMA JANE BLACKLOCK *et al. vs.* JACOB SMALL *et al.*

To the judges of the circuit court of the United States for the dist. of South Carolina:

In pursuance of an order made and entered in this cause and bearing date the 16th day of April, 1881, at a stated term of this

court, held at the United States court-house, in the city of Charleston, S. C., by which it was referred to me, as special master, to take the testimony in this cause, I, the subscriber, special master, do respectfully report that I have held references in the cause, of which the several att'ys for the parties to the same were duly notified, and that, having been attended by them, I have taken the testi-
68 mony offered in behalf of the complainants and defendants in the cause, which is herewith respectfully submitted.

E. M. SEABROOK,
Special Master.

UNITED STATES OF AMERICA, *District of South Carolina:*

In the Circuit Court. In Equity.

EMMA JANE BLACKLOCK *et al vs.* JACOB SMALL *et al.*

Testimony in above cause taken before E. M. Seabrook, Esq., special master, in pursuance of the order of said court, bearing date the 16th day of April, 1881.

Reference held before E. M. Seabrook, Esq., special master, at his office at the United States court-house, in the city of Charleston, S. C., on the 4th day of June, 1881.

Present: B. H. Rutledge and Henry E. Young, att'ys for
69 complainants; James P. Lessesne, Esq., for defendants.

The following oath was administered to Edward Carroll, Jun'r, engaged as stenographer to take and report the testimony herein: "I do solemnly swear that I will a true report and true transcript make of all the testimony taken by me in the case."

Sworn to before me this 4th day of ——, 1881.

E. M. SEABROOK,
Special Master.

No evidence was taken at this reference. The testimony taken to the plea to the jurisdiction in this case and in the case of Emma Jane Blacklock *et al.* against Olney *et al.* it is agreed by counsel shall be considered as evidence in the main cause in both cases, subject to the right of counsel for defendant to object to it as incompetant and inadmissible.

The following resolutions of the various banks in Charleston, S. C., of the 6th of September, 1861, are admitted as properly
70 proved, viz:

"1st. Resolved, That the several banks in Charleston will continue to receive treasury notes in payment of all dues to themselves, and also on deposit, and will receive payment in the same medium for all paper sent to them for collection, and they hereby decline all collection for which payment in treasury notes is not satisfactory.

"2. Resolved, That in conformity with the spirit and purpose of the foregoing resolutions, all credits will be given and be payable in currency, in which term treasury notes are included."

(Signed) DANIEL RAVENEL, *Chairman.*

Reference was then adjourned to June 7th, at 11 o'clock a. m.

E. M. SEABROOK,
Special Master.

71 UNITED STATES OF AMERICA,
District of South Carolina:

EMMA JANE BLACKLOCK *et al. vs.* JACOB SMALL *et al.*

CHARLESTON, S. C., *June 7th*, 1881.

Before E. M. Seabrook, Esq., special master.

Present: For complainants, B. H. Rutledge & H. E. Young, Esq'r's; for defendants, James Simons & Samuel Lord, Jr., Esq'r's.

C. G. MEMINGER called for complainants & sworn.

Direct examination by Mr. YOUNG:

Q. You are a member of the bar of South Carolina?

A. Yes, sir.

Q. Were you so during the Confederate government?

A. I was secretary of the treasury of the Confederate government.

Q. Still you remained a member of the bar at that time?

A. Of course I could not be considered practicing; still I remained a member of the bar.

72 Q. For how long a time were you a member of the cabinet of Mr. Davis?

A. From the commencement of the war until sixty-two or three; I don't remember which.

Q. Was there any law which made Confederate treasury notes legal tender?

A. There was no such law.

Q. Did or did not the Confederate constitution prohibit such a law?

A. That is my construction. The Confederate constitution in this respect is just like the Constitution of the United States.

Q. Do you know where a copy of the Confederate constitution or Confederate laws are to be found?

A. I suppose you can find plenty about here. I have not one, nor have I seen one for years.

E. M. MORELAND, Esq., called for complainants and sworn.

Direct examination by B. H. RUTLEDGE, Esq.:

Q. Will you state what was your business?

A. Stock and money broker.

73 Q. Were you following that occupation in sixty and sixty-one?

A. Yes, sir.

Q. The banks of the city of Charleston suspended payment, I *I* believe, in 1860?

A. Either late in sixty or early in 1861.

Q. You say that the banks suspended in 1860 or in the early part of 1861?

A. Yes, sir; I think so.
Q. Can you tell me whether the State bank was among them?
A. Yes; I think so.
Q. After the suspension of the banks took place how did the bank bills of the State bank rate with gold—were they ever or not received at par?
A. They were at a discount in the open market; they might have been received by private parties; they were below par in the open market?
Q. Was a bank bill of the "State bank" equal with a dollar in gold after the suspension?
A. No; immediately after the suspension they fell about five per cent.
74 — How did they go after that?
A. They continued to depreciate.
Q. Can you tell me about what the depreciation was in October, 1861?
A. In October, 1861, I think it was about ten per cent.
Q. That is as compared with gold?
A. It was between five and ten per cent., somewhere along there.
Q. That is compared with gold or silver?
A. Yes.
Q. Did you deal largely in those securities?
A. Yes.
Q. You bought and sold them both?
A. Yes.

"Cross-examination by Mr. LORD, Junior:"

Q. The banks continued to do business, did they not, after their suspension?
A. Yes.
Q. Up to what time?
A. I don't remember.
Q. About what time?
A. Until they had removed from the lower part of the city.
75 Q. Are you not aware that all continued business up to 1865, receiving money on deposit?
A. I don't know.
Q. Don't you know the banks all took a building, in the upper part of the city, upon Spring street?
A. I know the bank of the State did.
Q. Don't you know that they had branches in Columbia?
A. I don't remember.
Q. How did you fix the date when this particular bank discontinued?
A. I don't remember exactly.
Q. How do you know, then, about this particular bank, or about all?
A. I don't know; they all discontinued about the same time.
Q. Have you any distinct recollection about this particular bank?
A. No, sir.

Q. Are you able to fix the fact to which you have testified, that the bills of this particular bank, viz., the State bank, fell five per cent. below par?

76 A. The bills of nearly all the banks.

By Mr. LORD:

Q. But I am asking about this particular bank. What fact have you in your knowledge which enables you to say that immediately after the suspension this particular bank's bills fell five per cent.?

A. In October the bills were at five per cent. discount; I can't say about this particular bank, but I know that they all fell.

Q. Were not the bills of these banks, after their suspension of specie payments, sought after and hoarded as investments?

A. Not immediately after the suspension.

Q. Well, when?

A. When we got considerably into the war then they got to be sought after.

Q. They were very much sought after?

A. Yes.

Q. Did they or did they not then bring a premium?

WITNESS asks: A premium on gold?

Q. No; on Confederate money?

A. Yes.

77 Q. A very large premium as compared with Confederate money?

A. Yes.

Redirect examination by Mr. RUTLEDGE:

Q. When you say that you don't know about the banks, specially and particularly about the State bank, was there any distinction between the bills of the various banks in this matter?

A. No; they were all about the same.

Mr. LORD: I object to that on the ground that it is asking the witness a mere matter of opinion.

Q. If there had been a distinction in favor of the value of the bills of the State bank over other banks, would you have noted that or not?

A. I would have known it.

Q. Would you have known it now

A. I might not remember it know, whether there was a difference or not, but I would at the time.

Q. When you spoke about the people buying these bills, did they prefer them to gold or Confederate money?

78 A. No; they did not prefer them to gold; they preferred them to Confederate money.

Q. Can you fix the time when that occurred?

A. I can't tell; it may have been a year or so after the war commenced.

Q. Was there any speculation in bills as early as October, 1861?
A. I think there was.
Q. Did you hold any of the bills of the State bank after the war?
A. I don't remember whether I did or not.
Q. Did they have any value after the war?
A. I think they had some little value.
Q. Was the bank solvent or insolvent?
A. It was insolvent.
Q. Do you know whether it paid its depositors?
A. It did not.

RENE J. JEWEY, Esq., called for complainants and sworn.

79 Direct examination by Mr. RUTLEDGE:

Q. Look at the paper of the 29th of November, 1860. The following advertisement, that appeared in the Mercury of the 29th November, 1860, introduced subject to the objections of the defendants. In a local appears the following editorial in the Charleston Mercury of November 29th, 1860:

"*Bank Suspension.*

"Four of our banks suspended specie payment yestesday, the Bank of the State, State Bank, Bank of South Carolina, and Southwestern Railroad Bank. Of the nine banks now in Charleston, five have suspended."

From the Mercury of the 7th Sept., 1861. It is the publication of those bank resolutions. Charleston, Friday morning, September 6, 1861.—At a meeting of the delegates from the several banks of this city, held at one o'clock this day at the Planters' & Mechanics' Bank, all of the banks being represented, Mr. Charles Furman, the
80 chairman of the committee, appointed by our banks on the 22d ult. to proceed to Richmond and proffer to the secretary of the treasury such further loans as circumstances might render desireable until the treasury notes of the smaller denominations could be provided, submitted the report of the committee, the result being that the department declined the loan, deeming sufficient for the wants of the treasury the arrangement made in progress for the supply of treasury notes. Whereupon the following resolutions were unanimously adopted, viz:

1st. That the several banks in Charleston will continue to receive treasury notes in payment of all dues to themselves, and also for deposit, and will receive payments in the same medium for all paper sent to them for collection, and they hereby decline all collections for which payment in treasury notes is not satisfactory.

2d. Resolved, that in conformity with the spirit and pur-
81 pose of the foregoing resolutions, all credits will be given and be payable in currency, in which term treasury notes are included.

(Signed) DANIEL RAVENEL, *Chairman*

These resolutions were published in both the Charleston Courier of 7th September, 1861, and in the Charleston Mercury of the 7th September, 1861.

Reference then adjourned until Saturday, 11th June, 1881, at 12 o'clock.

UNITED STATES OF AMERICA, *District of South Carolina:*

EMMA JANE BLACKLOCK *et al. vs.* JACOB SMALL *et al.*

CHARLESTON, S. C., *June 11th*, 1881.

Before E. M. Seabrook, special master.

Present: B. H. Rutledge, Esq., for complainants; James Simons and Sam'l Lord, Jr., Esq'rs, for defendants.

WILLIAM THAYER sworn, called for complainants.

82 Direct examination by Mr. RUTLEDGE:

Q. What was your position at the beginning of the last war and during the last war?

A. Teller of the Bank of Charleston.

Q. At what time did Confederate money begin to be generally current and to displace other currency?

A. The first issue, I think, was during the summer of 1861—the green notes; I think they called them 2.30. About December, 1861, a considerable amount of currency had reached here, as I know from facts. In June, 1862, the bank was ordered from Charleston; I was sent with it, and had very little, if anything, else but Confederate money for circulation.

Q. What I want to get at is that between December, 1861, and June 1862, you said, as I understood you, that Confederate money began to be generally current?

A. I did not say that.

Q. Between December, 1861, and June, 1862, in the course
83 of that time did it generally displace other currency?

A. It did.

Q. Can you tell me whether there was (and at what time) a meeting of the representatives of the banks in Charleston, in which they determined that they would only make collections in currency?

A. Yes; I think it was in September.

Q. Were Confederate notes included in that?

A. Yes; I think so.

Q. Can you say whether or not after December, 1861, all business transactions were understood as being made with reference to Confederate notes?

A. That and bank bills; they ran parallel in the banks.

Q. As teller in the bank of Charleston, can you say whether or not the bank of Charleston accepted those notes for the balance due from the Planters' & Mechanics' Bank about the middle of December, 1861?

(Mr. Lord objects to this question as irrelevant.)

A. Yes.

84 Cross-examination by Mr. LORD:

Q. Can you give us the value of sterling exchange as compared with Confederate treasury notes between December, 1861, and April, 1862?

A. I can only speak from memory.

Q. Have you any data from which to go?

A. If I could lay my hand on the old book, which was drawn in triplicate (I have only a small book), I could find by reference to old books.

Q. When was there a resolution adopted by the banks putting a certain caption to the head of their bank books saying that deposits were subject to the depreciation in currency?

A. The publication was made in the newspapers, but that adoption was not until 1864; some of the banks made it (for instance, I have seen the books of the bank of the State). I saw and had in my possession one of the Planters' & Mechanics' Bank books; but we had in pursuance put it in as they would come in.

85 Q. The resolution that all the deposits made should be thereafter subject to the depreciation of the currency, &c., was adopted about 1864?

A. I think it was published about that time. I was going on to say that there were circulars issued in 1864. I would like to state for your information the matter specially to you. You will bear in mind that in deposits one-third was taken off.

Q. Can you fix the precise time when the volume of Confederate notes which had been issued was sufficient to effect sensibly the currency received on deposit in the banks?

A. From about June, 1862.

Q. Had it affected the currency so that deposits to a considerable extent were in Confederate notes?

A. Yes; nearly—in Confederate notes.

Redirect examination by Mr. RUTLEDGE:

Q. About that resolution of June, 1864; do you know
86 whether the State bank had any such notices?

A. I never saw any of their books.

Q. And you don't know?

A. The banks were all united. My recollection is that there was a general convocation met in Columbia. My memory is that Mr. Sebring, the pres'd't of the State bank, was in Columbia at that time.

Q. You think that the banks were all united—now, I mean the State bank?

A. I never saw one of their books. I saw the Planters' & Mechanics', and the Bank of the State.

Q. You have testified, as I understand you, in regard to the circulation of Confederate currency, that in June, 1862, it had become nearly altogether in Confederate government notes?

A. Yes.

Q. Was not the displacement going on gradually between December, 1861, and June, 1862?

A. Because the Confederate money and the bank bills were commonly current, but not gold or silver; but you would have
87 to pay something for either gold or silver about June, 1862. I don't think there was any distinction made. I merely mention that prior to December, 1861, the banks had sent a large proportion of their bills in.

Q. Robertson & Blacklock and Robertson, Blacklock & Co. kept their account at your bank?

A. Yes.

Q. Was there a large number of other anti-bellum notes in your bank?

A. I think so.

Q. Were they paid afterwards in gold or in Confederate money?

A. They were paid in—they were paid during the war in common currency. I think that book is in the bank.

By Mr. LORD: Show me their account there.

Q. People generally were receiving that currency for all debts, whether they were original or not?

A. Yes.

Q. What time?

A. 1861; yes, there was no distinction that I know of; the
88 only thing was if you wanted gold or silver in large quantities you had to pay a slight premium for it.

By Mr. RUTLEDGE:

Q. In October, 1861, were other bank bills or Confederate currency at par with gold or silver in the open market?

A. I don't think that the difference, if any, was of any consequence. I don't think it had affected it materially.

Q. But it had some.

A. I cannot say.

Q. In April, 1862.

A. I think it had affected it.

Q. Materially?

A. It depends very much upon what you call materially; at that time the difference was between five and ten per cent., but I would not call that material then.

Q. Why would you call that not material then?

A. Because of the plenteous currency that was then in circulation.

Put in evidence by Mr. Rutledge: Act of 1840, page 143,
89 11th statute, in edition of 1858, and page 110 in edition of 1873; act of 1860, 12th statute, page 630; act of 1860, page 860; 12th vol. of acts from 1856 to 1860 (page 278; acts of 1861, page 42; vol. 13, Corbin's act; vol. 14, act of 1863, 13 stat., page 190.

Reference was adjourned to 18th of June, 12 m., 1881.

E. M. SEABROOK,
Special Master.

UNITED STATES OF AMERICA, *District of South Carolina:*

EMMA JANE BLACKLOCK *et al. vs.* JACOB SMALL *et al.*

CHARLESTON, S. C., *June* 18, 1881.

Before E. M. Seabrook, special master.

Present: B. H. Rutledge & Henry E. Young for complainants; James Simons & Samuel Lord, Jr., for defendants.

JOHN F. BLACKLOCK called for complainants and duly sworn.

Direct examination by Mr. YOUNG:

90 Q. Will you give me the date of your marriage with Mrs. Blacklock?

A. 15th of May, 1839.

Q. Where did you and your daughters live during the war?

A. Principally in Liverpool, England.

Q. Do you remember the date of your going there?

A. I left here, I think, on *on* the 13th May, 1861; I took them with me to England.

Q. Did you or did your daughters leave any special power of attorney with Mr. Alexander Robertson?

A. They left none.

Q. Were they of age at that time?

A. No.

Q. Who were of age?

A. None of them.

Q. When did you return?

A. In 1866.

Q. What date?

A. October, 1866.

Q. When you and your daughters were in England during the war did you receive any remittances from this country?

91 A. No.

Q. Was any cotton shipped you?

A. None; nothing whatever.

Q. Anything of money value?

A. No; nor anything at all.

Q. You were a member of the firm of Robertson & Blacklock and Roberson, Blacklock & Co.?

A. Yes.

Cross-examination:

Q. You have testified you were in Europe during the war; did you not give up your residence in Charleston when you went to Europe?

A. Yes; I did not give up my citizenship, though.

Q. You intended to return as soon as the war was over?

A. Yes, I intended to return.

Q. Did you aid or help any citizen from South Carolina or other Confederate States while in Europe?

A. Certainly.

Q. Were you in sympathy with the citizens of South Carolina and the other Confederate States?

A. Certainly, as every respectable man should have been.

92 "When I said every respectable man" I mean that a man would feel with the State where he was born. I disapproved of secession & took away my children in consequence of it.

Q. Did you take your children away on account of secession or to avoid the perils of the war?

A. To avoid the perils of the war. Civil war is the greatest curse a country can have.

Q. Did you or did you not desire the success of the Southern States?

A. After the war commenced—yes, that I did.

Q. When did the firm of Robertson, Blacklock & Co. dissolve?

A. That I forget; it was while I was away.

Q. But when—just approximate, please?

A. I think it must have been in 1865.

Q. Just before your return from Europe?

A. Just before my return; when I came back I found the firm was not in existence.

Q. Did you receive any dividend from the firm?

A. No, sir; I was called to pay debts.

93 Q. Did you pay them?

A. No; because I was ruined.

Q. Do you know, of course of your own knowledge, what was the rate of exchange between this country, say Charleston, & Liverpool in the year 1861?

A. I know that in December, 1862.

Q. Well, I ask about the close of 1861?

A. Well, I bought a bill in the beginning of the war at seven per cent.

Q. The premium was seven per cent.?

A. Yes; that was the beginning of the war.

Q. Was the exchange in favor of England?

A. No; it was against England; the par of exchange requires a premium of 8 or 9 per cent. to bring it to par.

Q. Was the exchange not slightly in favor of this country?

A. At that time it was.

By Mr. YOUNG:

Q. Did that premium on exchange rise?

A. Very considerably.

Q. Did you know of any other purchases during the war?

94 A. I know on the 30th of December of some for Mr. Chisolm, who was in Europe.

Answer objected to.

Answer continued: On the 30th of December I saw A. H. Chisolm charged on the books of Robertson, Blacklock & Co. with a bill of exchange.

Q. In whose handwriting is the entry?

A. Mr. Moody's.

Q. That is the thirty-first of December, 1862?

A. Two hundred per cent. premium; I know about that time I paid some money for one of the planters for one of his sons; I was paid two hundred per cent. for it.

Q. You spoke of aiding various persons in Europe; were those individuals friends?

A. Yes; I would have helped them anywhere; they were young men who were out there for their education; they were coming home when the war broke out; there was no money to be sent them; there was Roose's family.

95 Q. What relationship did the- bear to your family?

A. They were relations of Mr. Robertson's wife. Mrs. Robertson and Mrs. Roose were sisters, and I married a sister of Mr. Robertson. I helped Mrs. Sparkman. She had a son out there.

Q. Well, were those all you helped?

A. Well, to my recollection, I helped a son of Frank Weston.

Q. Well, what relation to you was Frank Weston?

A. He is Mrs. Robertson's brother. Mrs. Robertson was his sister.

Q. What relation was Dr. Sparkman?

A. He was a customer of ours, and we were in the habit of furnishing him with money.

Q. Did or did not all of these gentlemen, in addition to being customers, bear the relation of friends?

A. Yes.

Q. What were the relations of the Rooses, the Westons, and the Sparkmans, as far as intimacy was concerned?

A. They were customers of the firm and personal friends.

96 Q. Were you not the dispenser of a fund supplied to you for aiding Confederates?

A. No, sir.

Q. Do you remember aiding a gentleman named Faber?

A. No; Mr. Prioleau aided him.

Q. Mr. Faber paid the money back to you after the war?

A. That was money I got by subscription—I got from some friends. He said he was in distress and wanted to get home.

Q. He was a distressed Confederate?

A. Yes; he was distressed altogether.

Q. And this subscription of which you were the dispenser was what aided him to get home?

A. Yes, sir.

By Mr. YOUNG:

Q. How old was he?

A. I suppose a man of fifty. The three thousand dollars, $2,900, paid by Olney Harleston to Mr. Robertson, if remitted to me at the rate of exchange before the war commenced, would have produced six hundred & twenty-five pounds sterling.

97 Q. Had it been remitted at the then rate of exchange of the 11th December, 1862?

A. It would have produced (£225) two hundred and twenty-five pounds sterling.

By Mr. YOUNG: I offer in evidence an act of South Carolina as to Confederate money, commonly known as Corbin's act.

BENJAMIN H. RUTLEDGE called for complainants and duly sworn.

Direct examination by Mr. YOUNG:

Q. You have advertised for claims against the estate of Miss Susan B. Robertson and none have been presented?
A. Yes, sir.
Q. And have you assented to the legacy?
A. Yes, sir.
Q. You have not in any way sanctioned the payment in Confederate money?
A. Of course not.
Q. Are you executor of Miss Susan Boone Robertson?
98 A. I am.

Put in evidence by Mr. Young, will of Miss Susan Boone Robertson, marked Exhibit "A."

Letters testamentary issued to B. H. Rutledge, marked Exhibit "B."

Marriage settlement of Jno. F. Blacklock and Mary Robertson, marked Exhibit "C," and assignment of J. F. Blacklock to E. J. Blacklock, M. Blacklock, & H. R. Blacklock, marked Exhibit "D." These, by *a* certified copies, not objected to and admitted.

Reference adjourned subject to call.

E. M. SEABROOK,
Special Master..

99 UNITED STATES OF AMERICA, *District of South Carolina:*

EMMA JANE BLACKLOCK *et al. vs.* JACOB SMALL.

CHARLESTON, S. C., *June 20th*, 1881.

Before E. M. Seabrook, special master.

"Present:" For complainants, Henry E. Young, Esq.; for defendant, James Simons and Samuel Lord, Esq'rs.

ALEXANDER ROBERTSON, duly sworn, called for complainants.

Direct examination by Mr. YOUNG:

Q. State your name and age.
A. Alexander Robertson. I was born on the 11th day of September, 1804.
Q. What was your occupation from 1850 to 1863?
A. A rice factor.
Q. Did you belong to a firm or not?
A. I belonged to the firm of Robertson & Blacklock, and it may be Robertson, Blacklock & Co.; we took Edward Thurston into partnership; what year I cannot remember.

100 Q. What year was the firm of Robertson & Blacklock formed?

A. I think Robert Thurston died in 1839.

Q. Was it in existence in 1850?

A. Robertson & Blacklock? I think so.

Q. Who composed the firm of Robertson & Blacklock?

A. Blacklock himself and Robertson, myself—1843?

Q. Do you recollect when you took Thurston in?

A. I recollect the year, but not the day.

Q. Don't recollect about when?

A. I don't remember.

Q. When Thurston was taken in the firm was it known as Robertson, Blacklock & Co.?

A. Yes.

Q. What relation did Robertson & Blacklock bear to Robertson, Blacklock & Co.?

A. How do you mean?

Q. Was not the only change in taking Thurston into the partnership?

A. That was all.

Q. Did you open new books?

A. The principal books were run on.

101 Q. Can you tell whether Robertson, Blacklock & Co. existed in 1859 or sixty?

A. Yes.

Q. Who conducted the business of Robertson, Blacklock & Co. during the war?

A. I did.

Q. Where were your partners?

A. One was in Europe, the other was in the army during the war; they were both absent.

Q. Where were you in 1860 and 1861; where did you reside?

A. My residence was known as No. 3 or 4 Society street. I was living there at the time of the great fire (December, '61).

Q. Did you know Capt. Jacob Small?

A. I think that I have seen him; I don't know that I knew him until he came into my office and paid me some money.

Q. Do you know whether or not he is a resident of Charleston?

A. I don't know.

Q. You say he bought a house from Mr. Blacklock?

102 A. Yes.

Q. Do you know whether he lived in that house?

A. I think so.

Q. You know personally of the sale of the house by Mr. Blacklock to Mr. Small?

A. Certainly.

Q. Who received the amount of the bond and mortgage given for that house?

A. I think I did; some of it anyhow, if not the whole. I recollect distinctly one morning Small's coming down and making a payment.

Q. How were the payments made—do you recollect? Where are the books?

A. I cannot remember distinctly. Small paid me up the amount of the bond. I tried to remit it to Blacklock, but I could not do so. I invested it in Confederate bonds. De Leon is an important witness in this case; he can tell you everything about bond & stocks. I kept a steady eye on the account.

103 Q. Did you notify the Miss-Blacklocks and Mr. Blacklock that you had received payment of the bond?

A. I intended to do so, but I don't think I ever did. I sold my personal estate of over 100,000 dollars and paid the debts of the firm to planters and others, and took up all paper with the firm's name except two notes, which I left over intentionally, because I thought myself badly treated by the makers.

Q. Did you send any money, the proceeds of the bond and mortgage, to Mr. Blacklock or his daughters?

A. Not the first cent—let that be fairly understood—I said just now I invested it in Confederate bonds.

Q. What effect had the war upon your fortunes?

A. It ruined me.

Q. You say you did not know Capt. Small personally?

A. I don't think I did.

104 Q. And you cannot remember in what way these payments were made to you; did he give you money or checks, or how?

A. He gave me a check on the State Bank—I think so.

Q. How did he pay you, according to the best of your recollection?

A. In depreciated currency.

Q. Did he give you a check on the bank, or bills?

A. He gave me a check.

Q. What did you do with the check or money you received from Capt. Small?

A. I put it to the credit of the firm of Robertson, Blacklock & Co. in the Bank of Charleston.

Q. In what currency were the checks of Roberston, Blacklock & Co. paid by the Bank of Charleston in October, 1861?

A. That was after the fall of Sum-ter?

(Mr. YOUNG: Yes.)

—. In Confederate money.

Q. In April, 1862, was there any change?

A. I think Confederate bills.

Mr. Lord objects to any questions as to the currency in which Robertson, Blacklock & Co were paid by the Bank of Charleston.

105 Q. Did the habit of the Bank of Charleston in paying their checks in Confederate money differ from the custom of other banks?

A. There was nothing else known; if there was any other currency seen you had to pay a heavy premium to see it.

"Cross-examined by Mr. LORD:"

Q. You remember when Confederate money was first brought here?

A. I think in the end of 1861.

Q. November, 1861?

A. I think about the end of the year.

Q. Sumter fell in April, 1861.

A. Well, then, late in that winter all the banks suspended; the Bank of Charleston, where I was a director, did not wish to suspend, but Furman, who was the president of the Bank of the State, said he could not go on if our bank did not suspend.

Q. What month or time was that?

A. In the end of 1861.

Q. Do you remember making any particular effort to send
106 this particular money to Mr. Blacklock?

A. I am confident I did not; there was such a constant demand on the bank for exchange I did not like to interfere, as a director, in using this exchange against the public interest; a patriotic feeling restrained me.

Q. But if you had asked the bank for exchange you could have got it?

A. I would have had to wait my turn.

Q. But the bank was selling exchange on England?

A. At two hundred per cent.

Q. When do you think exchange was two hundred per cent?

A. I don't know but that it may have been three hundred; I recollect sending Chisholm some which cost two hundred.

Q. What time?

A. I don't recollect.

MR. LORD: Your books will show that the 30 Dec'r, 1862, is the date. That was by his positive order, but Blacklock did not send any order.

107 Q. You did for your nieces just what you would do for yourself?

A. I did just as I would do for myself, knowing that it was the only thing to be done and everybody was doing it; yes, sir, why Chancellor Lessesne sold his house for Confederate money, at the corner of Orange and Tradd streets. I recollect, coming from my plantation in St. Thomas, I met Thomas Parker, and he said: Secession bill has passed; and it was from that time the confusion came; the time the secession bill was passed we sealed our fate.

Q. Do you recollect sending any money across the water during the war, it being in exchange?

A. I recollect selling some.

Q. You were selling it?

A. Mr. Petigue sent a woman to me with a bill; I sold it for her.

Q. And that was the only remittance you made?

A. That was all.

Reference adjourned until 12 o'clock, Tuesday, June 21, 1881.

E. M. SEABROOK,
Special Master.

108 CHARLESTON, *June* 22, 1881.

ALEXANDER ROBERTSON, recalled, says:

Direct examination by Mr. YOUNG:

Q. Will you state what you wish to state in relation to your previous testimony, "That you never read the answer and swore to it before the postmaster?"

A. I find I had read it at home and then went to Asheville and drummed up the clerk of the court, who had a seal; he, the clerk of the court, swore me to it and read a part of it to me. When in my former examination I said I swore to it before the postmaster, I meant to say the postmaster at Arden.

Q. In the entry in *pro tem.* Book No. 1, Journal, page 22, made 27 November, 1862, who is Miss E. Harleston, referred to?

A. The sister of Mr. Olney Harleston, Miss Elizabeth Harleston.

Q. In your testimony yesterday you said you never received payment of bonds in Confederate money after July, 1862. Do you wish to make any correction or explanation of this answer?

109 A. By this I meant that it was not my wish or desire to do so, and whenever I received payment it was under special circumstances or by positive instructions.

Q. Where the bond-book shows that bonds were paid after July 1862, in what currency were they paid?

A. In Confederate currency; there was no other currency.

Q. Where parties owed you money, and you held bonds belonging to them, did you receive payment and put the money to their credit—for instance, in the case of Wm. Harleston?

A. I received payment because it suited me and eased his account.

Q. You received payment of several bonds owned by Mr. Wm. Harleston, did you not?

A. Yes, as appears by the bond-book.

Reference adjourned subject to call.

E. M. SEABROOK,
Special Master.

110 UNITED STATES OF AMERICA, *District of South Carolina:*

EMMA JANE BLACKLOCK *et al. vs.* JACOB SMALL *et al.*

CHARLESTON, *July 20th*, 1881.

Before E. M. Seabrook, special master.

"Present:" B. H. Rutledge & H. E. Young, for complainants; James Simons & Samuel Lord, for defendants.

FRED. VON SANTEN called for defendants and duly sworn.

Direct examination by Mr. SIMONS:

Q. Will you state your name?

A. Fred. Von Santen.

Q. Your age and occupation?

A. Merchant; 51 years of age.
Q. How long have you lived in Charleston?
A. Since 1847.
Q. Were you here during the period of the war?
A. The latter.
Q. Where you here in the first part of 1860 & 1861?
111 A. Yes.
Q. Where were you?
A. I was in Charleston attending to business.
Q. Was the city of Charleston threatened at that time by an attack?
A. I considered it threatened from the beginning until the end of the war.
Q. Blockaded by the forces of the United States?
A. Yes.
Q. Do you know the property of Capt. Small, in Bull street, which is bought from Mr. Blacklock?
A. Yes.
Q. Was that house at any time during the war in danger from the shelling of the enemy?
A. Yes. I slept there a portion of the time. Capt. Small, in 1863, myself, and Mr. Henry Young were the only inmates in the house except the cook; that portion of the city was bombarded while I was in the house. In fact, I got up in the morning and took a walk, and I think it was near the house they were shelling, and a
112 house in this neighbourhood was struck.
Q. Do you know when this house was struck?
A. No; but the house next door was struck. I was awakened by the noise, and learned that the house was struck.

"Cross-examined by Mr. RUTLEDGE:"

Q. You said you were 51?
A. Yes.

HENRY YOUNG called for defendants and duly sworn.

Direct examination by Mr. SIMONS:

Q. State your name.
A. Henry Young.
Q. Your age.
A. 64.
Q. How long have you been living in Charleston?
A. Since 1849.
Q. Were you here during the period of the war?
A. Yes; during the whole time.
Q. Do you know the property Capt. Small purchased from Mr. Blacklock, the subject of this suit?
A. Yes. I staid in the house during the whole war.
113 Q The war was being waged, *between* at Charleston, between the Confederate States and the United States forces?
A. Yes.

Q. The city was being shelled by the United States forces during the war?

A. Yes.

Q. Was this house in the district being shelled?

A. Yes; a shell struck the kitchen.

Q. Which kitchen?

A. The kitchen in the yard. I was in the garden at the time and heard a shell coming in this direction and I stepped behind — and I thought it had struck it.

Q. Where did it first strike?

A. It struck the kitchen roof.

Q. Was there any other shell that struck the house?

A. None struck the house, but one struck next door, as Major Von Santen said; one struck in Smith street and one struck a pump.

Cross-examined by Mr. RUTLEDGE:

Q. What was the date when the shelling began?

A. I did not take the date down; it was when a few shells
114 were being thrown; it was a piece of about 25 lbs.

Q. Do you remember the date?

A. I don't.

Q. What year?

A. I think in 1863; it might have been the latter part.

JACOB SMALL, defendant, duly sworn:

Q. Will you state the circumstances connected with the payment of your bond and mortgage given for the purchase of your house, and the subject of this suit.

A. I would state this, that I purchased the property which I own and occupy from Mr. Alonzo J. White, broker; the same was owned by Mr. Jno. F. Blacklock; purchase made on the usual terms of third cash, balance in three instalments. I paid the cash portion on the 19th of March, 1861. I paid seven hundred and forty-two dollars for one year's interest, due the 20th of March, 1861, on the bond to J. F. Blacklock; receipt endorsed on bond. I paid the first instalment on the bond, three thousand six hundred dol-
115 lars, and one hundred and forty-seven dollars interest, in all three thousand seven hundred and forty-seven dollars, to Mr. Alexander Robertson on the 19th day of October, 1861. On the 4th of April, 1862, I paid two thousand dollars of principal and four hundred and ninety dollars interest to Mr. Alexander Robertson. When I made this last payment to Mr. Alexander Robertson I asked Mr. Robertson if he would receive the last payment; that I was prepared to meet it. Mr. Robertson then told me that the money came in the right time. (Objected to as hearsay by Mr. Rutledge.) On the 10th of April, 1862, I paid the bond in full—five thousand and two $\frac{14}{100}$ dollars—to Mr. Alexander Robertson.

Q. Did this conversation take place at the time of the payment of the bond?

A. When I paid the second instalment I then asked him if he would receive the third or last.

Q. Do you remember what took place when this money was paid?

116 A. Yes; I asked the question of Mr. Robertson; he answered in the way I have stated. I told him I would go home and make my arrangements and settle with him in a day or two. I paid him by checks on the State Bank, where I had good money.

Defendants' counsel introduces Mr. Small's check-book in evidence, marked Exhibit "E."

Q. Is that your check-book?

A. Yes; that is my own handwriting (pointing to the stubs in the check-book of the checks given to Mr. Alexander Robertson).

Q. How did you pay the money?

A. By checks on the State Bank, as shown in my check-book.

Defendant's counsel puts in evidence Capt. Small's pass-book with the State Bank, marked Exhibit "F."

Q. Will you show us here when you commenced to deposit anything but good money?

A. It was only on the 21st day of May, 1862, that the State
117 Bank commenced taking currency, and they marked it so in every book. Previous to that I deposited nothing but solid, good money. On February 17th, 1863, they have got marked deposited "Confederate treasury notes."

By Mr. LORD:

Q. You are in mercantile life — a president of a bank?

A. Yes.

Q. Did the bank of Charleston resume business after the war with considerable capital?

A. Yes; perfectly solvent.

Q. It was converted into a Nat. Banking Association?

A. Yes; it was continued.

Q. And is now in existence?

A. Certainly.

"Cross-examination by Mr. RUTLEDGE:"

Q. What was your business before the war?

A. I carried on a bakery at the corner of King and Princess streets.

Q. What is your business now?

A. President of the "Germania Savings Bank."

118 Q. Are you aware, Captain, that the banks in Charleston suspended specie payment in 1861?

A. I have no recollection of it at that time—not so far as my recollection goes.

Q. Had they suspended at the time, in 1862, when this money was paid?

A. Not to my recollection, because I deposited good money.
Q. What do you mean by good money?
A. I mean gold and these bills that were current of solvent banks and solvent corporations.
Q. Did you have any connection with the Confederate service?
A. My lieutenant, Mr. Young, could answer that question. I don't know exactly how to explain it. I was only in the State militia.
Q. This is what you had to do with the war?
A. Yes.
Q. Can you tell me how much gold you deposited between July, 1861, and the day of the payment?
119 A. No; I cannot.
Q. Were you in the habit during the war—that is, from 1860 to 1861—of taking a newspaper?
A. I suppose so.

Redirect examination:

Q. You wanted to explain what connection you had with the war?
A. I wanted to be understood that I did not enter the Confederate service for reasons best known to myself. I was ordered out by Governor Pickens, and Lieut. Young was in charge of the company at the time of the firing on the Star of the West. I was officer of the day.
Q. The only other point was about the suspension of specie payment?
A. I don't know anything about that; I don't recollect that.

By Mr. LORD:

Q. When you say that the banks had not suspended specie payment——
A. I speak entirely from recollection; what I do assert is
120 this: I had no Confederate money, and I paid it in good money. I never could have forced it upon Mr. Robertson if he had not consented to receive it.
Q. You are not certain, then, when the banks suspended specie payment, but you know you had good money?
A. Yes.

By Mr. YOUNG:

Q. You did not take the money out of the bank?
A. No; I gave it to Mr. Robertson in checks.

By Mr. SIMONS:

Q. How did you know that Mr. Robertson held the bond as trustee?
A. I paid the previous instalment to him.
Q. You did not know until you made the first payment to Mr. Robertson?
A. No.

Q. That was when you discovered it?
A. Yes.

The bond and mortgage, the subject-matter of this litiga-
121 tion, marked Exhibits "G" and "H," put in evidence, certified copy of the bill of complaint in the State court and the answer of Capt. Small in the case of Emma Jane Blacklock, Mary Blacklock, Helen Robertson Blacklock *vs.* Alexander Robertson and Jacob Small, put in evidence, marked "I" and "J." Mr. Rutledge admits that these are copies of the originals, and had no objection to copies being used instead of originals. Act of 1853, page 243, renewing and amending the charter of the State Bank, put in evidence. Act of 1853, page 245, renewing charter of the Bank of Charleston, put in evidence.

Reference then adjourned subject to call.

E. M. SEABROOK,
Special Master.

122 UNITED STATES OF AMERICA,
District of South Carolina:

EMMA JANE BLACKLOCK *et al. vs.* JACOB SMALL *et al.*

CHARLESTON, S. C., *July 26th*, 1881.

Before E. M. Seabrook, special master.
Present: B. H. Rutledge & Henry E. Young, Esq'r's, for complainants; James Simons & Samuel Lord, Jr., for defendant-.

B. BOLLMAN, witness for defendant-, duly sworn.

Direct examination by Mr. SIMONS:

Q. Did you ever buy any exchange during the war, between 1860 & 1861?
A. I bought, in 1860, the first bill of five hundred lbs. from John Fraser & Co.
Q. Do you remember the date?
A. The only way is from the books. I bought five hundred lbs. September 28th, 1861. Let me explain to you. My calculation is different from what it is now. When I said a pound sterling, the intrinsic value is about 4.84 or 4.85, which made a pound
123 sterling. I bought at 12 & ½ cts. premium, and this made a pound sterling $5.
Q. Did you buy any other exchange?
A. Yes; while we were on the race course I came to the city and bought a thousand pounds sterling from the bank of Charleston, for which I paid 20 per cent. premium.
Q. What was the date?
A. November the 9th, 1861. I am not so certain about this. I looked at my ledger, but in ledgers we cannot specify, and I could not find the journal or cash-book. I am certain I paid no more than 20 per cent. for this draft, and I bought from the State Bank a thousand pounds sterling.

Cross-examination by Mr. YOUNG:

Q. What was the par of exchange?

A. That depended on circumstances, whether there was a surplus of funds in England or here; it would range from 7 to 10 per cent.

Q. What was generally understood among the merchants as the par?

124 A. There was no par; there was always a premium on it.

Q. Was there not a general rate?

A. About 8 & ½ to 9 per cent., but there was no such thing as par on sterling exchange.

Reference adjourned subject to call.

E. M. SEABROOK,
Special Master.

UNITED STATES OF AMERICA, *District of South Carolina:*

EMMA JANE BLACKLOCK *et al. vs.* JACOB SMALL *et al.*

Testimony in reply taken in the absence of E. M. Seabrook, special master, by consent.

"Present:" For complainants, B. R. Rutledge; for defendant, Small, S. Lord, Jr., & Jas. Simons.

JOHN E. PHILLIPS, a witness for complainants, duly sworn.

Direct examination by B. H. RUTLEDGE:

Q. Will you state what was your occupation in 1861, 1862, & 1863?

125 A. I was a teller in the Bank of Charleston.

Q. Do you recollect about what date Confederate treas. notes became general currency?

Objected to by Mess. Simons & Lord on the ground that it is irrelevant, because Capt. Small paid by a check upon some other bank than the B'k of Charleston, to wit, the State Bank.

I have no means of fixing the exact date. It appears to me that it was in the latter part of 1861 or early in 1862 before Confederate treas. notes became the general currency.

Q. Was or was it not the custom of the B'k of Charleston to designate such deposits as were made in Confederate currency after 6th Sept., 1861?

Objected to upon same grounds as stated above.

A. They may or may not have done so before the passage of that resolution (res. having been read to witness), but after that Confederate treas. notes were specially designated when deposited.

126 Q. After 6th Sept. 1861, when those b'k resolutions were passed, according to the custom of the B'k of Charleston, was not a general deposit regarded as payable in Confederate treas. notes unless some other currency was specified.

Objected to upon grounds stated above; also as leading.

A. Yes, sir.

Q. Can you say if such was the general custom of the banks in the city?

A. At this lapse of time I could not state what was the custom of the other banks, but from looking at the deposit b'k of Capt. Small in the State Bank it seems that that bank did not.

Q. When did you terminate your connection with the Bank of Charleston?

A. In the spring of 1865—Aug. 8th, 1861.

JOHN E. PHILLIPS.

WM. THAYER, a witness for the plaintiff-, sworn:

Q. Was the Bank of Charleston solvent at the close of the war?

127 A. If it had been forced to a realization of its assets at the close of the war it would not have been solvent.

Q. Were deposits made between Sept. 6th, 1861, and the close of the war paid in anything but Confederate currency after the close of the war?

A. They were paid in currency unless there was some special arrangement.

Q. What was the market value of bills of the Bank of Charleston after the close of the war?

A. They started at 25c. on the dollar; went up to par in 1868 or 1869; think they sold for 25c. in the spring of 1865 & went up rapidly.

Q. If the bank had been called upon to pay its bills in full at the close of the war could it have done so?

A. It could not have done so at the then market value of its assets.

Cross-examined by Mr. LORD:

Q. Did the old Bank of Charleston reorganize as a national bank?

A. It did; & I think it was in April, 1872.

128 Q. With what capital?

A. I think the valuation of the assets was about one million dollars.

Q. Were those assets what remained of the property of the old bank after paying off its liabilities.

A. Yes; except some comparatively small liabilities.

August 8th, 1881.

WILLIAM THAYER.

UNITED STATES OF AMERICA:

BLACKLOCK *vs.* SMALL.

W. C. Courtney, duly sworn, says: I am now the president of the Bank of Charleston National Banking Association. The old Bank of Charleston was converted into this National Banking Association. I was a director of the old Bank of Charleston from about 1855 till its conversion into the above National Banking Association, and continued a director of this association till I became the president.

By the report of the assets made to the board of directors, and contained in the minute b'k, I find that at the close of the
129 war, May, 1865, the liabilities of the bank were valued at $1,625,645.00 and the assets at $612,900.00; of these liabilities, $— were for outstanding notes, etc., $1,565,645.

These were to a great extent bought up or arranged for at prices varying from 20 cents on the dollar to par.

In the president's (C. T. Lowndes) report to the board of directors there is the following, viz: That the circulation was reduced from $1,565,645 to $224,243.17, November, 1869. On the 17th day of November, A. D. 1869, by a report made to the board of directors, I find that the assets of the bank were then estimated at $1,013,684.84, and that the outstanding liabilities as $189,243. With this estimated capital the bank advertised it would redeem its bills at par.

The above estimate of assets proved too high. The non-mortgage So. Ca. R'y bonds specially fell off in value, and the above estimate of liabilities (1869) proved too low.

130 When the bank was reorganized as the National Banking Association the capital was fixed at $600,000, in 1872.

W. C. COURTNEY.

Sworn to before me this 2d day of September, A. D. 1881.

R. G. O'NEALE,
Notary Public.

131 THE UNITED STATES OF AMERICA,
District of South Carolina:

EMMA J. BLACKLOCK *et al. vs.* JACOB SMALL *et al.*

B. H. Rutledge, Esq'r, complainants' solicitor; Messrs. Simons & Siegling, attorneys for defendants; Sam'l Lord, of counsel.

CHARLESTON, S. C., *March* 22, 1880.

At a reference held before E. M. Seabrook, special examiner in the above-stated cases, this day, commencing at 11 o'clock a. m. (present, the attorneys above mentioned), the following testimony was taken on behalf of the defendants above mentioned:

ROBERT N. GOURDIN, being duly sworn, testifies as follows:

Direct examination by JAS. P. LESESNE, Esq.:

Q. What has been your residence?

A. My residence has been Charleston, ever since the year 1821, until the time I resided in Savannah, after the war, up to
132 about three years ago.

Q. What is now your residence?

A. Charleston.

Q. Do you know Mr. John F. Blacklock?

A. Yes, sir; I am certain I have known him since 1831; perhaps seven or eight years before.

Q. Where was his home during that time?

A. I believe, Charleston; I have known him to live here, except when he was in Europe, during the war.

Q. Do you know whether it was a temporary absence, and whether he returned home or not?

A. Yes, sir; I know he returned to resume his home here; I understood it to be only a temporary absence.

Q. Do you know, of your own knowledge, whether he was born here?

A. I don't.

Q. You know of his return from Europe?

A. Yes, sir.

Q. Do you know if he lived here ever since his return home?

A. Yes, sir.

133 Q. Do you know that he lives here now?

A. Yes, sir.

Q. Do you know whether or not his three daughters—Emma J., Mary, and Helen J. Blacklock—have always lived with him?

A. Yes, sir; I know that.

Q. Do you know whether those ladies were born in this State?

A. Well, I can't say that I know that; those are things of the past—a long time; but I am perfectly satisfied they were born here. I was a groomsman at Mr. Blacklock's wedding, and had more or less to do with his family ever since.

Q. Were these children born before he went to Europe?

A. Yes, sir; his wife died before he went to Europe.

Q. When did he go to Europe?

A. Some time in the summer of 1861.

Q. Do you know, of your own knowledge, that he has always been in Charleston since?

A. Yes, sir.

Q. You must know whether these children were born in

134 South Carolina up to that time?

A. Yes, they were born here.

Q. Do you know whether these three ladies are still living with their father?

A. Well, I don't know of my own knowledge that they are not living with their father now. I have been told not to say anything that is hearsay.

By Mr. RUTLEDGE: We object to anything that is hearsay.

By the WITNESS: Mr. Lesesne, I have seen a bill filed by Rutledge & Young, or by Mr. Henry Young, where two of those ladies swear in the city of Savannah that they are residents of Georgia, so I presume what I heard on that subject to be true and that they are over there.

(Objected to by complainants' solicitors.)

By Mr. LESESNE:

Q. As I understand, you are informed and believe two of these ladies have left their father's house and are now living in

135 Georgia?

A. I believe so.
Q. Do you know when they withdrew from their father's house?
A. The bill states the 1st of October.

Objected to by complainants on the ground that the bill speaks for itself.

No questions in cross-examination.

JOHN F. BLACKLOCK, being duly sworn, testifies as follows:

Direct examination by JAS. P. LESESNE:

Q. Are you the father of Emma J. & Mary who have brought suit against Olney Harleston, Jacob Small, & others?
A. I am.
Q. Are you a citizen of South Carolina?
A. Yes, sir.
Q. Where is your home?
A. 55 Meeting street, Charleston.
Q. How long has your home been in Charleston?
A. I was born here, to begin with. I lived here until 1861, when I went to Europe. I returned in 1866 and went back in 1867; came back in 1874, and have been living here ever since.
Q. From 1874 to the present time?
136 A. Yes, sir; except I was in Summerville and on Sullivan's Island, if you count that.
Q. You have three daughters?
A. Yes, sir; three daughters.
Q. Have those ladies lived with you at that time?
A. Always.
Q. Do they live with you now?
A. No, sir; two live in Georgia.
Q. Since what date?
A. I think it was about six months ago.
Q. Could you state positively whether it was October, 1879, or not?
A. It was very early in October that they went there—the very beginning of it.
Q. Then your remaining daughter, Helen, remains with you?
A. Yes, sir.
Q. These ladies are unmarried?
A. Yes, sir; all three of them.
Q. Were your daughters born here?
A. Yes, sir.

Cross-examination by H'Y E. YOUNG, Esq.:

Q. Two of your daughters have moved to Georgia?
A. Yes, sir.
137 Q. Which ones?
A. Helen J. and Mary.
Q. They moved there early in October, you say?
A. Yes, sir; the very beginning of October.

Q. Do you know whether they have abandoned their residence in South Carolina?
A. They have.
Q. Absolutely?
A. Yes, sir.
Q. Entirely?
A. Yes, sir.
Q. Do you know where there residence is now?
A. Savannah, Ga., 158 Liberty St.
Q. Has that been their permanent residence?
A. Yes, sir; ever since.
Q. Do you know that that is their home?
A. Yes, sir.

"Redirect examination by Mr. LESESNE:"

Q. What was the object in going to Savannah?
A. To try and get justice.
Q. In what way?
A. To get into the United States court.
138 Q. To acquire jurisdiction?
A. Yes, sir.
Q. You say these ladies are living in Savannah, at 158 Liberty St.?
A. Yes, sir.
Q. How long do they propose to live there?
A. I can't say how long. The fever may drive them out. Until it is unsafe to remain there any longer.
Q. You don't know for what period they intend to remain?
A. The period they engaged for is until the first of next month, the first of May, and if it is unsafe to find some other place.
Q. Do they intend remaining over the 1st of May?
A. It depends on the climate. I can't undertake to say whether it will be healthy or not.
Q. When this case is decided will you say on your oath whether those ladies intend to return?
A. Their intention just now is not to return.
Q. On your oath, don't they intend to return to your home at the conclusion of this case?
139 A. They don't intend to return to my home in Charleston.
Q. They intend to return to your home somewhere else, then?
A. I should suppose so.
Q. They left home in October?
A. Yes, sir.
Q. Don't you know whether they intend to return?
A. May be if we are through I would go to them instead of their coming to me.
Q. Suppose you fail or lose the case?
A. Time enough to consider then. How can I tell what I am going to do? Their intention is to remain in Georgia. My intention is to go to them if I have the means. I am a poor man, working for my living, and I can't give it up.

Q. That is their intention, whether they win or lose?

A. I can't undertake at present to say what they intend to do, and what I will do.

Q. You don't undertake to say what their intention is?

A. I don't. How can I answer for another?

140 Q. Did you talk to them or have any conversation with your daughters as to plans for the future and upon their intentions of returning to South Carolina?

A. I have not.

Q. You don't know what their intentions are?

A. They have not given me their intentions of returning or remaining here. I can't say what their intention is.

Q. Have you not had a conversation with your daughters of their return to South Carolina at the conclusion of this case?

A. So far, they have expressed no wish to return.

Q. Have you had any conversation with them?

A. I presume I have. I don't say I have had.

Q. Whether you have or have not?

A. I should say I have not.

Q. What conversation have you had with your two daughters as to their return at the conclusion of this case?

141 A. No further than they said they did not want to return here.

Q. Have you ever had any conversation with your two daughters on the subject of their return to South Carolina at the close of this case?

A. No, sir.

Q. Have you ever had a conversation with your daughters relative to their permanent abode at the conclusion of this case?

A. No, sir.

Q. Just now, in the course of your examination by Mr. Young, you stated your daughters were living at 158 Liberty street, Savannah, and intend to remain permanently?

A. Yes, sir.

Q. How do you know that?

A. They engaged rooms until the first of May and they expect to stay there if there is no sickness in the place. I can't explain any plainer than that.

The reference was then closed and adjourned.

E. M. SEABROOK,
Special Examiner.

142 THE UNITED STATES OF AMERICA,
District of South Carolina:

EMMA J. BLACKLOCK & MARY BLACKLOCK
vs.
JACOB SMALL *et al.*

CHARLESTON, S. C., *June* 17, 1880.

A reference was held in the above-stated cases this day, commencing at 11 o'clock a. m., before E. M. Seabrook, special master.

Present: B. H. Rutledge, Esq., and Henry E. Young, Esq., for the plaintiffs; Messrs. Simons & Siegling & Sam'l Lord, Jr., Esq., for the defendants.

EMMA J. BLACKLOCK, being duly sworn, says:

Direct examination by Mr. YOUNG:

Q. Will you state your name and age?
A. Emma J. Blacklock, and I am thirty-nine years old.
Q. Where were you born?
A. In Charleston, S. C.
Q. How long did you live here?
143 A. Until 1861.
Q. What did you do then?
A. I then went to Europe, and remained there until 1866.
Q. Did you return here?
A. I returned in 1866 and staid until 1867.
Q. Where did you go to then?
A. To Guernsey, Europe. We staid in Europe all the time until 1874; then I returned to Charleston, and I staid here until 1879, when I left for Georgia.
Q. About what time?
A. The 2d of October.
Q. What was your intention in leaving for Georgia?
A. To make it a residence.
Q. Did you or did you not give up or abandon this State as your home?
A. I gave it up entirely and intended to remain in Georgia.
Q. For how long?
A. The rest of my life.
Q. Do you know Mr. Alfred Chisolm?
A. I do.
Q. Did you have any conversations with him?
144 A. Very few; I spoke to him once or twice on personal matters—just an ordinary conversation.
Q. Where was this?
A. At Miss Winter's, No. 158 Liberty street.
Q. Where you had been living?
A. Yes, sir.
Q. He says you spoke of Charleston as your home and of your intention to return on the 1st of May. Will you state what occurred?
A. Mr. Chisolm is mistaken in saying that I said so. I had no idea of returning on the 1st of May permanently. I never told him so; he must have got this impression from other directions.
Q. You did not say to him you intended to return?
A. No, I did not.
Q. Since when is it that you went to Georgia?
A. Second of October.
Q. Where have you resided steadily?
A. No. 158 Liberty street, Savannah, Georgia.
Q. Mr. Chisolm says that they, meaning you and your sister,

which he afterwards limits to yourself, said you expected to
145 remain 6 months, until May, and then return home?

A. No; I think Mr. Chisolm made a mistake. I did not know that my rooms had been taken until May. I thought it was for the winter, and I found it meant May.

Q. What do you mean by your rooms had been taken?

A. They were taken at Miss Winter's; I have the rooms now, at the present moment. My luggage, &c., is in Miss Winter's house now, and has been there since last October. The rooms were taken to the first of May because she makes her arrangements that way. I was not aware of it. Then she extends her arrangements afterwards.

Q. They are extended now?

A. Yes, sir.

Q. You did not know that when you first went there?

A. Not when I first went there; we staid at Miss Winter's; we intended to stay there or — any other house in Savannah.

Q. Mr. Chisolm says he heard you say this several times
146 in his presence. Did you have many conversations with him?

A. I have no recollection but of that one.

Q. You are entirely confident you gave him no grounds for saying this?

A. Not the slightest.

Q. Have you any intention of returning to Charleston?

A. None at all.

Q. Then you swear, when you left Charleston to go to Georgia you went there with the purpose of making that your home and giving up South Carolina forever?

A. Yes, sir.

Q. Did you, prior to going to Georgia, make an effort to find another home?

A. Yes, sir; in Virginia. I left here August 11th and went to Virginia, but the climate was too cold. We returned the 11th of September, and staid in Charleston until the 2nd of October, and then went to Georgia.

Q. You went to Virginia for what purpose?

147 A. Making a home in Virginia instead of Georgia.

Q. And you found it would be too severe to stay in winter and you determined to seek some other State?

A. Yes, sir.

Q. Where did you go to from Virginia?

A. Charleston, S. C.

"Cross-examination by Mr. LORD:"

Q. You spoke of going to Europe on several occasions?

A. Yes, sir.

Q. When did the determination to abandon your home in Charleston and acquire a new home elsewhere first enter your mind?

A. Last June.

Q. What were your reasons for forming that determination?

A. To get this case brought into the United States court, as a similar case had already been decided.

Q. What case is that you refer to?

A. Mrs. Carson's.

Q. Was your determination to change your home permanently a matter of conversation before you left Charleston?

148 A. Of course, I had to tell my father I intended to leave South Carolina and go to Georgia.

Q. You said it to your father?

A. Yes, sir.

Q. State exactly what occur-ed between your father and yourself.

A. Nothing more than I meant to change my home in order to bring this case, and he consented to my doing so.

Q. Did you state to him for how long a time?

A. I expected to stay there always.

Q. Did you announce it to your father?

A. I did.

Q. In your conversation with him you stated distinctly your intention to leave?

A. Yes, sir; I meant to leave South Carolina and live in Georgia.

Q. Permanently?

A. Yes, sir.

Q. Could there have been any doubt on his mind as to that?

A. I should say not.

Q. Did you converse with him on one occasion only or on several occasions?

A. Several times.

Q. There is another sister, is there not?

149 A. Yes, sir.

Q. She remains with your father?

A. Yes, sir.

Q. Have you any means of support except what your father gives you?

A. Very small.

Q. You depend upon him?

A. Yes, sir.

Q. For your livelyhood?

A. Yes, sir.

Q. Your father is a gentleman of very limited means?

A. Yes, sir.

Q. Altho' once wealthy, very much reduced in his old age?

A. Yes, sir.

Q. In case this suit is determined adversely to you, where do you expect to make your home?

A. In Georgia.

Q. You propose, then, to entail upon your father the additional expense of living in Georgia, whether you gain this suit or not?

A. Yes, sir.

Q. When did you first discover that Mr. Robertson received payment of this money?

150 A. After my return here in 1866.

Q. You then discovered the receipt of this money?

A. Yes, sir.

Q. When did you discover the receipt of money by Mr. Robertson from Harleston?

A. The first payment was from Mr. Small; it was only lately I found out about Harleston. No; I am wrong. I think it was in 1866 also. I know it was after we came back here.

Q. Have you from that time to the filing of this bill ever taken steps to set aside this payment by Harleston to Robertson?

A. Not Harleston, but Mr. Small.

Q. You acquiesced, then, without objection in the payment by Mr. Harleston of this money until the filing of this bill?

A. No, sir; we claimed that Harleston has not paid it.

Q, To whom did you make this claim?

A. Made it to himself?

Q. Did you tell him?

151 A. I did not tell him so.

Q. Who told him?

A. I did not tell him so; we requested our solicitors to do so.

Q. Who are your solicitors?

A. Messrs. Rutledge & Young.

Q. Did they do it?

A. Yes, sir.

Q. Are you certain of that?

A. Yes, sir.

Q. Did they tell you?

A. They wrote me that they had.

Q. Why did you not change your residence at an earlier day, so as to get your case into the U. S. court in the case of Harleston?

A. We changed our residence as soon as we found a prior case had been decided, and to bring it into this court we would be obliged to leave South Carolina.

Q. The decision in Carson and Robertson then induced you to change your residence?

A. It finally induced us to change our residence; we had been trying it before; in 1866 we were trying.

152 Q. When did you first determine to change your residence to some other place?

A. In 1879.

Q. When was it your first intention to change your residence elsewhere permanently?

A. Since 1867; we went abroad to stay away entirely.

Q. You went away in 1867 with the intention of remaining away finally?

A. Yes, sir.

Q. Making your home where?

A. In Europe.

Q. You abandoned that idea?

A. We were obliged to return to Charleston on account of loss of money.

Q. When this case is ended what would be your purpose of remaining in Georgia?

A. As we now reside there I intend to live there.

Q. What reason would you have for living away from your father and sister when this litigation is over?

A. My father and sister can join us there.

153 Q. Is it the determination of your father and sister to join you in Georgia when this case is over in case it should be lost?

A. It is my father's and sister's intention to join us in Georgia, whether the case is concluded or not, at any time they can do so. As long as he has the means of support in Carolina he will stay here. Our means are limited, and his means of support may be taken away from him, and he may as well come to Georgia and join us there.

Q. What inducement have you to remain in Georgia, away from your father and your sister, after the termination of this case, should he not join you there?

A. Because we went there with the intention of staying there; therefore we intend to carry out our intention, and will remain there.

Q. What inducement would you have to remain in Georgia, away from your father and sister, if your father's means would not permit him to join you?

154 A. I would have no inducement to return to South Carolina.

Q. It is your intention, then, to remain permanently in Georgia?

A. It is.

Q. Even tho' you should lose this case and your father and sister unable to join you?

A. Yes, sir.

Q. I asked you some time ago what was your inducement to change your home. You stated that your only inducement was to get this case into the U. S. court; to give it jurisdiction.

A. Yes, sir.

Q. When, therefore, the case is over, what inducement would you have to remain in Georgia?

A. Because it is our intention to make it a home.

Q. For what purpose?

A. For living in it.

Q. You expect, then, to live there entirely for the rest of your life?

A. Yes, sir; for the rest of my life. My father can answer for himself. I intend to remain in Georgia.

Q. When you went to Savannah, who engaged rooms for you?

155 A. Mr. Lewis Young.

Q. What was the original contract made with your landlady?

A. For the winter.

Q. To terminate when?

A. I took it we were to remain all the time, unless we became dissatisfied. As long as we were satisfied we would remain there. She stated the winter terminated in May.

Q. Were the rooms taken for six months?

A. Not to my knowledge.

Q. They were not taken for an indefinite time?

A. They were taken for as long as we choosed to remain; we either intended to remain there or some other house in Sav'h.

Q. How were the rooms engaged?

A. For the winter.

Q. They were not engaged for as long as you saw fit to remain there?

A. Yes, sir. If it suited us to remain. I told Miss Winter we would stay as long as we were satisfied.

Q. In the contract made between Mr. Young and Miss Winter, was there any stipulation as to time?

156 A. I was not present.

Q. Did you inquire if there was?

A. No; Miss Winter told me.

Q. What did she tell you?

A. She told me for the winter and that it would end in May, but I was to remain longer. I have the room now, and I am paying for it to-day.

Q. You continue to pay now the same rent you paid during the winter?

A. She charges me by a private arrangement between us. She does not charge me for board, but while I am out of the house I am charged with lodging. She certainly would charge for lodging.

Q. Do you pay so much a room instead of board?

A. Yes, sir.

Q. Have you any relatives in Savannah?

A. Very distant.

Q. Did you not go to Savannah originally under the belief that a six-months' residence there would be sufficient for the pur-

157 poses of this case, and you intended to return at the end of that time?

A. I did not; my counsel told me I could not return; that when I went I must stay.

Q. How did he come to mention that?

A. Only on the bearings of the case.

Q. Up to the time of your removal to Savannah you have always lived with your father?

A. Yes, sir.

Q. And you resolved to abandon your home, your father, and sister, and separate yourself from them forever?

A. I resolved to go to Georgia.

Q. In case they should not be able to join you after the termination of this suit, what will you do?

A. Remain in Georgia.

Q. You went and intend to stay there simply for the purpose of giving jurisdiction to the U. S. court?

A. I left this State with the intention of going to Georgia to remain there with the hope that my father and sister would join me there.

158 Q. If they cannot you will still persist in remaining there?

A. I will still persist in remaining there.

Q. When did you first find out you were owner of this bond?

A. It was a long time back.

Q. When did you first find out that you and your sisters were the legal owners of the two bonds given your father by Harleston and Small?

A. It was somewhere in 1866 or '68.

Q. After your return to this country?

A. The small bond I knew of in 1861.

Q. When did you find out that the bond was assigned to Robertson in trust for you and your sister?

A. That was in 1866, when we came back, but I knew of the Small bond before. I knew the house had been sold, and my father told me he had given us the money; that when he had sold the house he had given the money to his children.

Q. What relation is Robertson to you?

159 A. He is my uncle.

Q. You say that you were informed by your solicitors that they had given notice to Harleston that you claimed this as an improper payment?

A. Yes, sir.

Q. When were you informed by them that this notice had been given?

A. It was in the fall of 1879.

Redirect examination by Mr. YOUNG:

Q. You have been asked about your means of support depending upon your father. Who owns all the property in your family?

A. My sisters and myself.

Q. Your father owns none?

A. No, sir.

Q. Do you and your sisters contribute to the support or not of his household?

A. Yes, sir.

Q. How?

A. By a little income coming from a plantation.

Q. Don't you do work to support yourself?

A. Yes, sir; we do.

Q. What sort?

A. Sewing.

160 Q. Have you not been in the habit of making certain articles and sending them North?

A. Yes, sir.

Q. What are they

A. Lace and palmetto work.

Q. So you are not entirely dependent on your father?

A. Not entirely.

Q. You spoke of the expectation and hope of your sister and father coming to Georgia to be with you; state if there are any steps taken to realize that.

A. We have already written to try and get information in regard to a farm in the neighborhood of Marietta with a view of staying there. My father's means of support have been lately taken from him.

Q. Since his return from Europe what has been his means of support?

A. For the past two years he has been treasurer of the Charleston & Savannah Railroad.

Q. Was it a permanent employment to which a termination was expected?

161 A. I believe it was expected to terminate on account of the road being sold, or a prospect of its being sold.

Q. Did or did you not know the road was under litigation?

A. Yes, sir; I did.

Q. When you went to Europe you went there with the intention to stay away entirely?

A. Yes, sir.

Q. You gave that up on account of the time?

A. Yes, sir.

Q. How long have you entertained the idea and been trying to make arrangements about a home in Marietta, Georgia?

A. I wrote, I think it was in March.

Q. Was it before or after the examination of your father and other witnesses here in this court?

A. It was in the beginning of March. I don't remember when they were examined.

Q. Have you any relatives in Charleston?

A. Very distant.

162 Q. Have you any here at all?

A. A few, very distant.

Q. You spoke of the advice of your counsel. State what your counsel told you was absolutely necessary to acquire jurisdiction.

A. To leave South Carolina; give it up as a State and home; go to some other State and remain there.

Q. So it was a sacrifice to separate from your father?

A. Yes, sir; it was.

Q. You understood what you were going to do and made up your mind to make this sacrifice?

A. Yes, sir.

Q. You swear solemnly that you intended, on 2 Oct., '79, to make Georgia your home forever?

A. Yes, sir.

Q. And it is your intention still?

A. Yes, sir; I intend to remain there.

163 MARY BLACKLOCK, being duly sworn, says:

Direct examination by Mr. YOUNG:

Q. Will you state your name?
A. Mary.
Q. Your full name?
A. Mary; that is all.
Q. And your age?
A. 35 years.
Q. Are you one of the plaintiffs in the case against Small and Harleston?
A. I am.
Q. Where were you born?
A. Charleston.
Q. How long have you lived there?
A. Until 1861.
Q. Where did you go to then?
A. Europe.
Q. Staid there?
A. Yes, sir.
Q. For what purpose?
A. We went at first to travel.
Q. What happened to you in 1861?
A. The war broke out and we went away.
Q. Did the fact of there being war have any effect upon your going?

A. We went sooner in consequence of the war. My father
164 had always promised to take me away to Europe. We staid there until 1866, then returned; then went back again in 1867; when we went the last time we left not to return.

Q, Did you change that intention?
A. We changed it because we were forced to it.
Q. You staid here after your return until you went away?
A. Until last October, when we left for Georgia. We went first to Virginia.
Q. Was it your intention to stay there?
A. Yes, sir; we went there in August.
Q. How long did you stay?
A. About a month.
A. Why did you leave?
A. Because the climate was too cold, and we would prefer Georgia as a residence.
Q. When did you go to Georgia?
A. The second of October.
Q. What was your intention in doing so?

A. To live there and make it a residence or home.
165 Q. For how long?
A. Forever.

Q. To make it a permanent home?
A. Yes, sir.
Q. Where did you stay in Georgia?

A. No 158 Liberty street, Savannah.
Q. Your own house?
A. We boarded with Miss Winter.
Q. Have you the rooms still?
A. We have.
Q. Do you know Mr. Alfred Chisolm?
A. I do.
Q. How often have you met him?
A. One or two occasions only, lately.
Q. What conversation did you have with him in regard to this suit?
A. I had no conversation with him; my sister had.
Q. Were you present?
A. Yes, sir; she told him that we had left South Carolina to become citizens of Georgia and residents of Savannah.
Q. Mr. Chisolm says that your sister said that for the pur-
166 poses of this suit you and she were to stay there for 6 months, and that you and she expected to return by the first of May. Did you ever hear it?
A. Not one word—never.
Q. Have you heard any such conversation between her and anybody else?
A. Never.
Q. Have you ever spoken of returning to Charleston within six months?
A. No, sir.
Q. You heard no such conversation?
A. None at all; I was present; I did not hear any such.
Q. You went to Georgia the 2nd Oct'r, 1879, to make it your permanent home?
A. Yes, sir; I did.
Q. And it is your intention still?
A. Yes, sir.

"Cross-examination by Mr. LORD:"

Q. You left Charleston several times with the determination of not returning?
A. Once before in 1867, when we went to Europe.
167 Q. When you went in 1861 with what intention was it?
A. With the intention to travel—nothing else.
Q. That was according to a promise your father made you that he would take you traveling?
A. Yes, sir.
Q. It did not contemplate anything like a protracted stay in Europe?
A. No, sir; nothing of that kind.
Q. Your father was then in a large business?
A. Yes, sir.
Q. When you went to Europe, was it to get out of the country during the war?
A. Partly to be away during the war.

Q. You did not contemplate remaining in the United States during the war?

A. No, sir.

Q. When did the thought of your leaving your home in Charleston and exchange for it a residence in another place first assume shape in your mind?

168 A. Since a similar case as ours had been decided. I refer to the case of Mrs. Carson.

Q. When did you first discover that you and your sister owned the two bonds and mortgages given by Mr. Small and Mr. Harleston to your father?

A. I heard long ago my father tell us, as well as I remember, that he had sold the house to Mr. Small, and had put in our names the bond.

Q. When did you discover that you were owners of the Harleston bond upon which this suit was brought?

A. We became owners of that when my aunt died in 1868. She left us some property. My two aunts died; they both left us everything.

Q. What were your aunt's names?

A. Mrs. Rowand and Mrs. Robertson; they left us property, and it was in that we became possessors of the bond.

Q. When did your aunts die?

A. Miss Robertson died in 1868, and Mrs. Rowand died after 1870.

169 Q. It was after the war?

A. Yes, sir.

Q. And you then acquired ownership of this bond?

A. Yes, sir; it was left us as the property of Mrs. Rowand; it came to us after Mrs. Rowand's death. We knew the terms of both wills.

Q. What was your aunts' first names?

A. Susan Robertson and Helen Rebecca Rowand.

Q. Referring to Small's bond, when did you first find out that this bond had been paid in Confederate money?

A. Not until some time after. We knew nothing of it at the time.

Q. Was it after your return to this country?

A. It must have been in 1866; we came back in 1866, and, I think, it must have been after.

Q. When did you find out the Harleston bond had been paid in Confederate money?

A. It was after that again we found it out.

170 Q. Give us, as near as you can, the date.

A. I really can't give the exact date.

Q. Was it before you went back to Europe?

A. Yes, sir; certainly.

Q. You went back when?

A. In 1867.

Q. Did you at that time make any claim against Harleston?

A. No, sir; against Mr. Small we did.

Q. You did not make any claim on Harleston?

A. No, sir.

Q. When you left Europe at the close of the war was it with the intention of returning permanently to this country?

A. No, sir; with the intention of finding out what property had been left and go back again. We came back in 1866 with the express purpose of looking up these matters and see what property was left in any direction.

Q. And you then discovered the payment of the Small bond?

A. About that time.

Q. Was it before or after your return that you discovered payment of the Harleston bond?

171 A. I don't know exactly. I know I knew about the Small bond.

Q. Why, then, did you not at that time change your residence, so as to get these cases into the U. S. court?

A. Because we did not have any wish to change our residence then.

Q. Why should you now?

A. Because a similar case has been decided.

Q. I ask you why you did not in 1867 change your residence and become a citizen in another State, so as to give jurisdiction to *to* this court?

A. We were then trying this case in the South Carolina court—the case against Small.

Q. Did you abandon that case?

A. It was dropped for a time.

Q. Nothing was done again until the decision in the case of Carson & Robertson?

A. No legal steps were taken. It was never dropped.

Q. You have done nothing to enforce it?

A. Nothing to enforce it.

172 Q. Before going to Georgia you had always lived with your father and sister?

A. Yes, sir.

Q. Your sole inducement in going to Georgie is to give jurisdiction to this court?

A. Yes, sir.

Q. Have you now any other inducement to remain in Georgia, except to retain jurisdiction in this court?

A. I intend to live there.

Q. Have you no other inducement to remain there except a desire to retain the jurisdiction in this court?

A. I wish to stay there.

Q. What other reasons have you for remaining?

A. Because I like to do it. I intend to remain there entirely and have no intention of coming back.

Q. If the decision is adverse to you and your father and sister so circumstanced as to be unable to join you, what then is your determination?

A. Remain in G-orgia.

Q. To leave him finally?
173 A. Yes, sir; unless he comes to us in Georgia.
Q. Did you before you left have any conversation with your father on the subject of this change of residence?
A. Certainly.
Q. Be kind enough to say what purpose you expressed to him?
A. That I intended to leave and stay in another State.
Q. Finally?
A. Yes, sir.
Q. Was that purpose expressed repeatedly?
A. Yes, sir.
Q. To your father?
A. Yes, sir.
Q. You have had several conversations with him?
A. Certainly; to arrange our plans.
Q. In all of these conversations you left no doubt on his mind of your intention to remain in Georgia?
A. Not that I am aware of. I don't know what his impressions were; my intention was to go to remain.
Q. At Savannah what was the length of the time for which your board was engaged?
A. We boarded at Miss Winter's.
Q. To terminate when?
A. I was not aware when it terminated; it was said in March.
174 Q. Where were you to go then?
A. To remain in Savannah.
Q. Where do you expect to stay?
A. In Savannah.

"Redirect examination by Mr. YOUNG:"

Q. You say your father and yourself spent some time in Europe during the war?
A. Yes, sir.
Q. How did your father support himself during that time?
A. By speculating in cotton.
Q. Was he engaged in business?
A. One time before he speculated in cotton.
Q. When you came back in 1866 to look after your property, was it your intention to remain permanently in this place or return to Europe?
A. To return, if possible.
Q. You say you began your case against Capt. Small; what was the result?
A. It was dropped.
Q. Can you give the reasons?
A. Because there was a similar case decided against minors
175 in South Carolina, and we decided to drop the case for a time.
Q. Under whose advice?
A. Our lawyers.
Q. Who were they?
A. Messrs. Rutledge & Young.

Q. Were you and your sisters and your father pleasantly received when you came back in 1866?

A. Yes, sir; very pleasantly. We have been always.

Q. Did you or your sister have any conversation with your father, or any one else, based upon the bringing of these cases?

A. Yes, sir.

Q. What was the intention of yourself and sister in case of your winning or losing?

A. We never for one minute thought of it. If we should win or lose it is our intention to remain in Georgia. We are trying to buy a farm in Georgia.

Q. Where?

A. At Marietta.

Q. Have you endeavored to carry out that idea?

A. Yes, sir. We have written several times for information.

176 Q. What has been your father's employment lately?

A. Treasurer of the Charleston and Savannah railroad.

Q. Was not your father's employment as treasurer a very uncertain one.

A. Yes, sir; it was a very uncertain one, because the road was to be sold.

Q. Will you state again your hope and expectation when your father lost his employment?

A. It is our hope and expectation that he will come to us in Georgia.

Q. When you engaged your rooms in Savannah you engaged them for the winter.

A. Yes, sir.

Q. With any understanding afterwards of your retaining them if you wished?

A. Yes, sir; afterwards.

Q. And you know — engage- them?

A. Yes, sir.

Q. For how long?

A. From month to month.

Q. Why?

177 A. Because of our going to Marietta, and the climate of Savannah in summer is not very healthy, and there is danger of yellow fever, and if it comes, of course, we would not stay there.

Q. Has that influenced you in engaging rooms from month to month?

A. Yes, sir.

Q. Do you swear solemnly that on the 2nd of October, 1879, when you went to Georgia you went for the purpose of making it your home?

A. Yes, sir.

Q. And to abandon South Carolina as your home forever?

A. Yes, sir.

Q. And that is your intention now?

A. Yes, sir.

Q. You have not changed it?

A. No, sir.
Q. When do you expect to return to Savannah?
A. In this month, to go on to Marietta.
Q. It depends upon your going to Marietta?
A. Yes, sir.

178 Reference was then adjourned to Saturday, 11 o'clock a. m.

E. M. SEABROOK,
Special Master.

CHARLESTON, S. C., SATURDAY, *June* 19, 1880.

By agreement of *of* the solicitors in this cause the reference fixed for to-day was adjourned to Thursday, the 24th, at 11 o'clock a. m.

E. M. SEABROOK,
Special Master.

CHARLESTON, S. C., THURSDAY, *June* 24, 1880.

By agreement of the solicitors in this cause the reference fixed for to-day was adjourned to Friday, the 25th, at 12 o'clock m.

E. M. SEABROOK,
Special Master.

CHARLESTON, S. C., FRIDAY, *June 25th*, 1880.

A reference was held this —, commencing at 12 m.

Present: The solicitors engaged in the cause.

179 The testimony of Emma J. and Mary Blacklock, taken at a previous reference, was read in their presence for the purposes of correction.

EMMA J. BLACKLOCK recalled.

"Examined by Mr. YOUNG:"

Q. In answer to the question in your examination, "You spoke of the advice of your counsel; state what your counsel told you was absolutely necessary to acquire jurisdiction," you said, "To leave South Carolina; give it up as a State and home; go to some other State and remain there." Remain there how long?
A. Permanently.
Q. You say to what Mr. Chisolm said, "I had no idea of returning on the 1st of May; I never told him so."
A. I meant to say I did not mean to return permanently, but believed I had to return here to give testimony when the court met.
Q. When were you informed would be that time?
180 A. The end of April or the beginning of May.
Q. Who told you so; who informed you?
A. My counsel.
Q. Did you have with your father or sister any conversation about what you would do or not do in case you win or lose this case, based on the contingency of winning or loosing?
A. No; I never had.

Q. About your lodging; has anything taken place since your examination? If so, state it.

A. Since I was examined, altho', as I believed, in possession of the room, still Miss Winter put some one in the room from the 2nd to the 18th of May, and refuses to take the money for the lodging for the 16 days.

Q. That is, since you gave your testimony?

A. Yes, sir.

Cross-examination by Mr. LESESNE:

Q. You never told Mr. Chisolm you were going to return to Charleston?

A. No, sir.

181 Q. Did you tell Mr. Chisolm you were going to return to Charleston for any purpose?

A. I don't remember ever telling him that I was going to return. If I did, I did not mean to return permanently.

MARY BLACKLOCK recalled.

Examination by Mr. YOUNG:

Q. Referring to this conversation of Mr. Chisolm, can you give an account at all as to how he got this impression shown in his testimony?

A. The only way (after thinking it over) that I can imagine he got the idea, I told Mrs. Chisolm we had rooms at Miss Winter's until the 2nd of May. We took them first for the winter, and in speaking to Miss Winter she considered that that meant the 2nd of May. I told Mrs. Chisolm we were bound to board at Miss Winter's until the 2nd of May; after that we could go where we liked. I then meant anywhere else in Georgia. That is the only

182 way I can possibly account for it. We had no intention of leaving Georgia. We only had the rooms until May.

Q. Did you expect to come over here to testify?

A. Yes, sir; I knew we had to testify about the end of April.

Q. Who told you?

A. Messrs. Rutledge & Young. In my former testimony, in speaking of my father's business, I mean we went into business after speculating in cotton. I thought that the winter we engaged the rooms for meant until the 1st of April. About the bond; I meant we came into possession of the whole bond when my aunts died. I am well aware most of it belonged to my mother; therefore became ours at her death. My aunt's death—that is, Mrs. Rowand—was in 1874.

Q. You spoke of your father as an old man; how old is he?

A. Seventy-five years.

183 "Cross-examination by Mr. LESESNE:"

Q. Did you say you told Mr. Chisolm?

A. I was speaking to Mrs. Chisolm about the rooms we engaged.

The reference was then adjourned until next Wednesday.

E. M. SEABROOK,

Special Master.

EXHIBIT E.

Copies of Stubbs from Check-Book of Defendant, Jacob Small.

184 No. 724.

March 19th, 1861. Interest on house $742 00

No. 864.

Oct'r 19th, 1861. Alexander Robertson, trustee for J. F. Blacklock, 1st instalment on house in Bull St.:

Instalment	$3,600	
Interest	147	
		3,747 00

No. 973.

April 4th, 1862. Instalment on house, Bull street $2,000
Interest for 12 months on $7,000.00 490
2,490 00

No. 976.

April 10th, 1862. J. F. Blacklock, for house, Bull street, in full 5,002 14

EXHIBIT F.

In the pass or deposit book kept between Jacob Small and the State Bank, Small's deposits, from 1861, July, and up to April 29th, 1862, are entered as follows, to wit:

April 26th. Deposit $260 00

Next deposit is as follows:

April 29th. Currency $376 00

This form of entry continued until June 3rd, 1862, when the following deposit is entered:

June 3rd, 1862. Deposit $215 00

185 This form of entry was continued until 17th February, 1863, when the following occurs:

February 17th. Deposit, Confederate treasury notes $400 92

The pass-book shews the payment of the checks hereinbefore set forth as given by Small to Robertson.

Yours truly,

SIMONS & SIEGLING.
S. LORD, *Of Counsel.*
B. H. RUTLEDGE,
Per H. E. Y.

186 EXHIBIT "G."

THE STATE OF SOUTH CAROLINA:

Know all men by these presents that I, Jacob Small, of the city of Charleston, in the said State, am held and firmly bound unto John F. Blacklock in the full and just sum of twenty-one thousand two hundred dollars, to be paid unto the said John F. Blacklock, his certain attorney, executors, and administrators or assigns; to which payment, well and truly to be made and done, I bind myself and each and every of my heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with my seal and dated the twentieth day of March, in the year of our Lord one thousand eight hundred and sixty, and in the eighty-fourth year of the Sovereignty and Independence of the United States of America:

The condition of the above obligation is such that if the above-bound Jacob Small, his certain attorney, executors, or administrators, shall and do well and truly pay or cause to be paid unto the above-named John F. Blacklock, his certain attorney, executors, or administrators or assigns, the full and just sum of ten thousand six hundred dollars by three equal & successive annual instalments,
187 the first of which is to be paid on the twentieth day of March, anno Domini 1861, together with interest from the date hereof upon the said principal sum or so much thereof as shall from time to time remain unpaid, to be payable annually until the whole amount hereby secured shall be fully satisfied, then the above obligation to be void and of none effect; or else to remain in full force and virtue. JACOB SMALL.

Sealed and delivered in the presence of—
EDMOND DUNN.

Exhibit "G." E. M. Seabrook, special master.

For value received I hereby assign, transfer, and set over all my right, title, and interest in this bond to Alexander Robertson in trust for children of J. F. Blacklock.

J. F. BLACKLOCK.

Witness:
GEO. W. MOODY.

Received 19th March, 1861, of Mr. Jacob Small seven hundred and forty-two dollars for one year's interest, due 20 July, on this bond.

$742. J. F. BLACKLOCK.

Received 19 October, 1861, of Mr. Jacob Small three thou-
188 sand six hundred dollars in part of the principal and one hundred and forty-seven dollars in full of the interest on same to date, leaving $7,000 due carrying interest from 19th March last.

$3,600
147

$3,747

A. ROBERTSON, *Trustee.*

Received April 4th, 1862, four hundred and ninety dollars for one year's interest, due 19 ulto., on this bond and two thousand dollars in further parts of the principal, leaving 5,000 due from 19 ulto.

A. ROBERTSON, *Trustee.*

$2,000
490

$2,490

Received April 10th, 1862, five thousand and two dollars $\frac{14}{100}$ in full of the principal and interest on this bond.

$5,002.14. ALEX. ROBERTSON,
Trustee for Children of J. F. Blacklock.

189 EXHIBIT "H."

THE STATE OF SOUTH CAROLINA:

To all whom these presents may concern I, Jacob Small, of the city of Charleston, in the State aforesaid, send greeting:

Whereas I, the said Jacob Small, in and by certain bond or obligation bearing even date herewith, stand firmly held and bound unto John F. Blacklock in the penal sum of twenty-one thousand two hundred dollars, conditioned for the payment of the full and just sum of ten thousand six hundred dollars by three equal and successive annual instalments, the first of which is to be paid on the 20th day of March, A. D. 1861, together with interest from the date thereof upon the said principal sum or so much thereof as shall from time to time remain unpaid, to be payable annually until the whole amount thereby secured shall be fully satisfied, as in and by the said bond and condition thereof, reference being thereunto had, will more fully appear:

Now, know all men that I, the said Jacob Small, in consideration of the said debt and sum of money aforesaid, and for the
190 better securing the payment thereof to the said John F. Blacklock according to the condition of the said bond, and also in consideration of the further sum of three dollars to me, the said Jacob Small, in hand well and truly paid by the said John F. Blacklock at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release, unto the said John F. Blacklock, his heirs and assigns, all that lot of land, with the dwelling-house and buildings thereon, situate on the north side of Bull street, in the city of Charleston, measuring in front on Bull street aforesaid 104 feet 5 inches, more or less, by a depth of 248 feet six inches or thereabouts on the west line and two hundred and forty-five (245) feet six (6) inches or thereabouts on the east line and 105 feet or thereabouts on the back line.

And also all that strip of land immediately adjoining the said lot on the east side, measuring in width 12 feet or thereabouts, and extending from Bull street aforesaid to the lot lately of Daniel Huger, deceased.

And also all that piece of land immediately adjoining the
191 said first-mentioned lot to the westward, measuring in width 10 feet or thereabouts, and extending from Bull street for a depth of 190 feet or thereabouts, and then measuring from the line of the first-mentioned lot running westward 60 feet or thereabouts; then running northward fifty-eight feet six inches or thereabouts; then eastward on the north or back line of the said first-mentioned lot sixty-eight feet or thereabouts, abutting to the northward on a burial ground; then to the eastward partly on the said lot of Daniel Huger, Esq., and partly on the lot of Henry Buist, Esq., to the south on Bull street aforesaid, and to the west partly on the lot of Benjamin Lucas and partly on the lot of —— ——, which premises have been this day conveyed to the said Jacob Small and are now mortgaged to secure a portion of the purchase-money of the same, together with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging or in anywise incident or appertaining:

To have and to hold all and singular the said premises unto
192 the said John F. Blacklock, his heirs and assigns, forever; and I do hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said John F. Blacklock, his heirs and assigns, from and against myself, my heirs, executors, administrators, and assigns, and all other persons whomsoever lawfully claiming or to claim the same or any part thereof.

Provided always, nevertheless, and it is the true intent and meaning of the parties to these presents, that if I, the said Jacob Small, my heirs, executors, administrators, or assigns, do and shall well and truly pay, or cause to be paid, unto the said John F. Blacklock, his executors, administrators, or assigns, the said debt or sum of money aforesaid, with the interest thereon, if any shall be due, according to the true intent and meaning of the said bond and condition thereunder written, then this deed of bargain and sale shall cease, determine, and be utterly null and void; otherwise, it shall remain in full force and virtue.

And it is agreed by and between the said parties that I am
193 to hold and enjoy the said premises until default of payment shall be made.

Witness my hand and seal this twentieth day of March, in the year of our Lord one thousand eight hundred and sixty, and in the 64th year of the sovereignty and Independence of the United States of America.

JACOB SMALL.

Signed, sealed, and delivered in the presence of—

PHILIP J. PORCHER.
EDMOND C. DUNN.

Exhibit "H." E. M. Seabrook, special master.

THE STATE OF SOUTH CAROLINA, *Charleston District:*

Personally appeared before me E. Dunn and made oath that he saw the within-named Jacob Small sign, seal, and, as his act and deed, deliver the within deed, and that he, with P. J. Porcher, witnessed the execution thereof.

EDMOND C. DUNN.

Sworn before me this tenth day of April, 1860.

ALONZO J. WHITE,
N. P., Magistrate ex Off'o.

194 CHARLESTON, *April* 10, 1862.

The bond having been paid in full that this mortgage was given to secure, I declare the same satisfied and cancelled.

ALEXANDER ROBERTSON,
Trustee for the Children of John F. Blacklock.

Witness:
J. W. AINGER.

THE STATE OF SOUTH CAROLINA, *Charleston County:*

Personally appeared before me Jos. W. Ainger and made oath that he saw the above Alexander Robertson, trustee of the children of J. F. Blacklock, sign the above acknowledgement of satisfaction on this mortgage, and that he witnessed the same.

J. W. AINGER.

Sworn before me this 10th day of April, A. D. 1862.

WM. J. ELLIOTT,
Magistrate.

Exhibit "H." E. M. Seabrook, special master.

MESNE CONVEYANCE OFFICE,
CHARLESTON DISTRICT.

I certify that the within deed is duly recorded in Book O, No. 14, page 90, this 19th April, 1860.

HENRY TRESCOT,
Register M. C.

195 For value received I hereby assign, transfer, and set over all my right, title, and interest in this mortgage to Alexander Robertson, in trust for children of John F. Blacklock.

——— ———.

Witness:
——— ———.

Full satisfaction entered 11th April, 1862.

HENRY TRESCOT,
Register M. C.

196 EXHIBIT "I."

STATE OF SOUTH CAROLINA, *Charleston County:*

In Equity.

To the honorable the circuit judges of said State:

The bill of complaint of Emma Jane Blacklock, Mary Blacklock, and Helen Robertson Blacklock, complainants, against Alexander Robertson and Jacob Small, defendants.

Humbly complaining, shew unto your honors your oratrixes, Emma Jane Blacklock, Mary Blacklock, and Helen Robertson Blacklock, that on or about the 20th March, anno Domini eighteen hundred and sixty, John F. Blacklock, the father of complainants, sold a house and lot in Bull street, in the city of Charleston, described in the deed conveying same as "all that lot of land, with the dwelling-house and buildings thereon, situate on the north side of Bull street, in the city of Charleston, measuring in front on Bull street aforesaid one hundred and four
197 $\frac{5}{1/2}$ feet, more or less, by a depth of two hundred and forty-eight $\frac{6}{1/2}$ feet or thereabouts on the east line, and one hundred and five feet or thereabouts on the back line, and also all that strip of land immediately adjoining the said lot on the east side, measuring in width 12 feet or thereabouts, and extending from Bull street aforesaid to the lot lately of Daniel Huger, deceased, and also all that piece of land immediately adjoining the said first-mentioned lot to the westward, measuring in width ten feet or thereabouts and extending from Bull street by a depth of one hundred and ninety feet or thereabouts, and thence measuring for the line of the first-mentioned lot running westward 68 feet or thereabouts; thence running northward 58 feet or thereabouts; thence eastward on the north and back line of the first-mentioned lot 68 feet or thereabouts, abutting to the north on a burial ground; thence to the eastward partly on the said lot of Daniel Huger and partly on the lot of Henry Buist, to the south on Bull street aforesaid, and to the west partly on the lot of Benjamin Lucas and partly on the lot of —— ——, which premises have been this day conveyed to the said Jacob Small, and now mort-
198 gaged to secure a portion of the purchase-money of the same for the sum of —, of which — was paid in cash and the balance in a bond conditioned for ten thousand six hundred dollars, payable in —, said bond being secured by a mortgage of the premises of even date therewith.

And your oratrixes further shew that on or about the — day of ——, anno Domini eighteen hundred and sixty, the said John F. Blacklock duly assigned the said bond and mortgage to Alexander Robertson, in trust for the children of the said John F. Blacklock, who are your oratrixes, which said assignment was endorsed upon the bonds and mortgage aforesaid now in the possession of the said defendant, Jacob Small; that during the continuance of the late war, and while the said State was associated with other of the Southern States, under

the constitution known as the constitution of the Confederate States, the said defendant paid up the said bond as follows, to wit: On the 19th October, A. D. 1861, on account of principal, $3,600, and of interest $147.00; on the 4th April, A. D. 1862, on
199 account of principal, two thousand ($2,000) dollars, and of interest, four hundred and ninety (490) dollars; and on the tenth of April, A. D. 1862, the balance of principal, to the amount of five thousand dollars, and two 100 dollars on account of interest, said payments having been made in the treasury notes of the said Confederate States, and upon the receipt of which the said trustee, Alexander Robertson, *who* accepted the same in liquidation of said bond and satisfied the mortgage aforesaid.

And your oratrixes further shew that the said trust was created for their benefit, and at the time of its creation all of them were infants of tender years, and that shortly after the assignment of said bond and mortgage to the trustee, Alexander Robertson, to wit, on the — day of ——, anno Domini eighteen hundred and —, as aforesaid, the father of your oratrixes, John Freer Blacklock, removed with them to England, in the Kingdom of Great Britain, and remained there till the close of the war; and your oratrixes were entirely ignorant that any payments had been made upon the bond whatsoever until they returned to said State, when they
200 learned that their property had been lost, and that the payment of the bond aforesaid, which had been given for the purchase of real estate of great value, had been made in worthless paper; that they were greatly chagrined and disappointed on ascertaining these facts, as the trustee had never been authorized by them, or either of them, or any other proper authority, to receive the treasury notes of the said Confederacy in payment of said debt.

And the said Jacob Small had full notice of the said trust, because of the assignment on the bond and mortgage aforesaid, and because the receipts given him on occasion of his respective payments thereon were signed by Alexander Robertson, trustee of the children of John F. Blacklock, and the mortgage is satisfied in a similar manner, to wit: "April 10th, 1862," " the bond having been paid in full that this mortgage was given to secure, I declare the same satisfied and cancelled.—Alexander Robertson, trustee of the children of John F. Blacklock," as will appear by reference to record
201 of said mortgage in book —, page —, Register of Mesne Conveyance, Charleston county.

And your oratrixes further say that the said trustee in accepting the said treasury notes, which, even under the constitution of the Confederacy aforesaid, were not a legal tender in the payment of debts, and which were unlawful, as issued for the purpose of accomplishing the overthrow of the Government of the United States, and also at the time of reception by him greatly depreciated, violated his duty and is guilty of a — and is accountable to your oratrixes, and more especially for that he was in no way authorized to do so, either — your oratrixes or by any authority in said trusts contained, and that the said defendant, Jacob Small, in attempting to pay his debt, justly incurred for very valuable property, in an

illegal, unconstitutional, and depreciated currency, to a person holding a fiduciary capacity, he having full notice of the said trust, such person being unauthorized to receive the same by law or expressed or implied consent, which your oratrixes, being minors, were
202 unable to give under any circumstances, has failed to liquidate the said debt, and that the same is still due and unpaid to your oratrixes, and the satisfaction of the mortgage executed to secure the same by the said trustee without authority is inoperative and void, and the lien thereof is still a subsisting lien, and in any event that the said defendant, Jacob Small, according to the well-established principles of equity jurisprudence, having gotten into his possession the property of your oratrixes without valuable consideration, with full notice of the trust which thereto attached, is liable to account fully to your oratrixes for the value of the same.

And your oratrixes well hoped that no dispute would have arisen touching the claim of your oratrixes, but that said defendant would have complied with the reasonable request of your oratrixes, made in pursuance of the statements aforesaid; but now, so it is, may it please your honors, that the said defendants, combining and confederating with each other and with divers other persons, at present unknown to your oratrixes, whose names when known your
203 oratrixes pray they may be at liberty to insert herein with apt words to charge them as parties defendant hereto, and contriving how to wrong and injure your oratrixes, they, the said defendants, absolutely refuse to comply with such requests and at times alleged and pretend, according to their several and respective positions, the said trustee, that in taking said bills and notes in payment of said bond he acted only as other wise and discreet persons did and as he did himself in the management of his own affairs, and that he was authorized to receive the same also by authority of an act of the Legislature of said State permitting trustees to invest in Confederate securities; and the said Jacob Small — that the said bills and notes were the only currency circulating in said States at the time of the payments aforesaid, and that he is not responsible if the said trustee chose to accept the same, and, so far as he is concerned, the said bond is fully paid and satisfied. Wherefore your petitioners charge the contrary and allege that the said trustee was unauthorized to receive such illegal and depreciated currency in payment of an obligation entered into when gold and silver were
204 the only legitimate currency of the United States and Confederate States.

And that the defendant, Jacob Small, could not discharge a debt of such character by a transfer to your oratrixes' trustee, who had no authority to receive them, illegal and depreciated notes, payable on a contingency, which, under the constitution of the Confederate States, were not a legal tender, said defendant Jacob Small, at the time of the said payment, having full notice of the said trust by reason of the signatures of the said Alexander Robertson, trustee, upon the receipts for each of the said payments and upon the satisfaction of the mortgage as aforesaid.

To the end, thereof, that the said defendants and their confed-

erates may answer as aforesaid, and that the said Alexander Robertson, trustee, may account to your oratrixes for his administration of the said trusts, and that the payments aforesaid in Confederate currency by the said Jacob Small, pretending to be in satisfaction of said bond, may be disallowed, and the satisfaction of the said mortgage securing said bond by said trustee be annulled and the mortgage
205 re-established and declared a subsisting lien on the said land, and that mortgage foreclosed and the said land sold, and the debts due your oratrixes paid and satisfied; and that your oratrixes may have such other and further relief as the nature of this case may require and to your oratrixes shall seem meet.

May it please your honors to grant unto your oratrixes a writ of *subpœna ad respond-um*, to be directed to the said Alexander Robertson and Jacob Small, commanding them and each of them personally to be and appear before your honors in this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and to stand to, perform, and abide such order, action, and decree therein as to your honors shall seem meet.

And your oratrixes shall ever pray, &c.

B. H. RUTLEDGE,
Solicitor for Complainants.

Exhibit "I." E. M. Seabrook, special master.

206 EXHIBIT "J."

THE STATE OF SOUTH CAROLINA, *Charleston County:*

In the Common Pleas, on the Equity Side.

EMMA JANE BLACKLOCK, MARY BLACKLOCK, and HELEN ROBERTSON BLACKLOCK, Plaintiffs,

against

ALEXANDER ROBERTSON and JACOB SMALL, Defendants.

The defendant, Jacob Small, by Simons and Siegling, his attorneys, answering the complainant herein, alleges—

I. That on the 20th March, A. D. 1860, he purchased of J. F. Blacklock the premises described in the pleadings and took therefor a conveyance in fee from the said J. F. Blacklock, with covenants, which was duly recorded on the 10th day of April, 1860, in the registry of mesne conveyance office for Charleston county, then district, in Book J, No. 14, page 54.

II. That for the credit portion of the purchase-money he
207 executed to the said J. F. Blacklock his bond and mortgage, bearing the same date, conditioned for the payment of the sum of ten thousand and six hundred dollars by three equal successive annual instalments, with interest from the date thereof, payable annually.

III. That on the 19th day of March, A. D. 1861, he paid to the said J. F. Blacklock seven hundred and forty-two dollars, being one year's interest on the said bond.

IV. That this bond was subsequently assigned, as he understood, to Alexander Robertson, and while he was the holder of the same this defendant paid and satisfied it in full in three payments, the first being made on the 19th of October, 1861, when he paid three thousand six hundred dollars of the principal and one hundred and forty-seven dollars in full of the interest; the second being made on the 4th April, 1862, when he paid two thousand dollars of the principal and four hundred and ninety dollars in full of the interest; the third payment being made on the 10th of April, 1862, when he paid five thousand dollars in full of the principal and two $\frac{14}{100}$ dollars in full of interest on the said bond and mortgage.

208 V. That upon said last payment in full the bond and mortgage was delivered to him and a receipt endorsed thereon by the said Alexander Robertson in full of the principal and interest, and so likewise was the mortgage, with an endorsement of satisfaction on the same, which was entered of record on the 11th April, 1862, in the office of the register of mesne conveyance for Charleston district, where it had been originally recorded, and the following entry made on the record: "Full satisfaction entered 11th April, 1862. Signed, Henry Trescott, register M. C." Which said bond and mortgage, with the endorsements of payments and satisfaction thereon, are now in the hands of the solicitors of the defendant.

VI. That this defendant claims that the said bond and mortgage are, by virtue of the said payment, delivery, and satisfaction, absolutely extinguished as against him, and he pleads the said payment, delivery, and satisfaction in bar to any relief prayed against him.

VII. That this defendant denies that any portion of the payments made on the said bond and mortgage, whether of principal

209 or of interest, were made in the treasury notes of the said Confederate States; that the payments of October 19th, 1861, April 4th, 1862, and of April 10th, 1862, when the bond and mortgage were duly satisfied in full, were made and paid by checks on the State Bank of South Carolina, at which time this defendant had no Confederate currency on deposit in the said bank.

VIII. That the said Alexander Robertson represented and this defendant implicitly believed that he had, from the fact of having in his possession and under his control the said bond and mortgage and receiving payment therefor, full power and authority to deal in any and all matters fully with him touching and concerning the same, and that under no circumstances can loss or damage be visited upon this defendant, who is altogether innocent and acted in good faith under the protection of the court. This defendant submits that it would be a fraud to impose upon him any liability.

IX. That this defendant denies all the other allegations and all manner of combination and confederacy wherewith he is by

210 the said complaint charged, and demands that the said complaint should be dismissed and his costs, expenses, and charges in this behalf most wrongfully sustained be decreed to him.

(S'g'd) JACOB SMALL.

Exhibit "J." E. M. Seabrook, special master.

THE STATE OF SOUTH CAROLINA, *Charleston County:*

Jacob Small, the defendant above named, being duly sworn, says that he has read the foregoing answer, and that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

JACOB SMALL.

Sworn to before me this 25th day of April, A. D. 1870.

RUDOLPH SIEGLING,
Not. Pub., ex Off. Mag.

211 And at the April term of the said court the following decree was filed, which decree is in the words and tenor following:

Decree.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court. In Equity.

EMMA J. BLACKLOCK and MARY BLACKLOCK, Citizens of the State of Georgia,

vs.

212 JACOB SMALL, a Citizen of the State of South Carolina; ALEXANDER ROBERTSON, a Citizen of the State of North Carolina, and HELEN ROBERTSON BLACKLOCK, a Citizen of the State of South Carolina.

This cause came on for trial at the April term, 1883, and on hearing the bill and answers, the testimony, and the arguments of Messrs. B. H. Rutledge, for complainant; James Simons and S. Lord, for the defendant, Jacob Small, and H. E. Young for the defendants, Alex. Robertson and Helen Robertson Blacklock, it is ordered and decreed that the bill of complaint herein be dismissed with costs.

April 19th, 1884.

HUGH L. BOND,
C't Judge.

And on the 3rd day of May, 1884, came into court the complainants and the defendant, Helen R. Blacklock, by their solicitors, B. H. Rutledge and H. E. Young, and filed the following claim and
213 allowance of appeal from the decree in this cause, which claim and allowance of appeal is in the words and tenor following:

Claim and Allowance of Appeal.

UNITED STATES OF AMERICA,
South Carolina District, Fourth Circuit:

In the Circuit Court.

EMMA JANE BLACKLOCK *et al. vs.* JACOB SMALL *et al.*

By the decree in this cause, filed 19th April, 1884, the bill in this cause was dismissed. The complainants and the defendants, Helen R. Blacklock, pray an appeal therefrom.

On motion of B. H. Rutledge, complainants' solicitor, it is ordered that said appeal be allowed, and as the property involved is real estate and in the possession of the appellee, Jacob Small, it is further ordered that the appeal bond be fixed at two hundred dol-
214 lars, with one obligor as surety, to be approved by the clerk of the court.

May 3d, 1884.

HUGH L. BOND,
C't Judge.

And on the 22d day of July, 1884, came into the court Emma J. Blacklock and Mary Blacklock, by their solicitor, B. H. Rutledge, and filed the following summons and severance, which summons and severance is in the words and tenor following:

Summons and Severance.

CHARLESTON, S. C., *July 22d*, 1884.

To Jacob Small, Alexander Robertson, and Helen R. Blacklock:

You are hereby notified that Emma J. Blacklock and Mary Blacklock have applied for and obtained an allowance of appeal to the Supreme Court of the United States from the decree of the circuit court, made on the 19th day of April, 1884, in the case of
215 Emma J. Blacklock and Mary Blacklock against you, the said Jacob Small, Alexander Robertson, and Helen R. Blacklock.

You will please inform me at my office, No. 26 Broad street, Charleston, S. C., within thirty (30) days from the service hereof, if you or any of you will join in said appeal. If you fail to do so the said Emma J. Blacklock and Mary Blacklock will prosecute said appeal alone.

B. H. RUTLEDGE,
Appel. Att'y.

Service of Summons and Severance.

I acknowledge service for Helen R. Blacklock, & say that she is not content with the decree of the circuit court, and does hereby join in the appeal therefrom and does sever from her codefendants, Jacob Small & Alexander Robertson.

July 22d, 1884. H. E. YOUNG, *Att'y.*

For the reasons stated in my answer, but without prejudicing the rights of the appellants, I decline to join in the
216 appeal.

July 22d, 1884.

H. E. YOUNG,
Att'y for A. Robertson.

And on the 23rd day of July, 1884, came into the court, by their solicitors, and filed the following bond, which bond is in the words and tenor following:

Bond.

UNITED STATES OF AMERICA, *District of South Carolina:*

In the Circuit Court.

EMMA J. BLACKLOCK *et al. vs.* JACOB SMALL *et al.*

Know all men by these presents that we, Emma J. Blacklock, Mary Blacklock, Helen R. Blacklock, and Christopher S. Gadsden are held and firmly bound unto Jacob Small and Alexander Robertson in the full and just sum of two hundred dollars, to
217 be paid to the said Jacob Small and Alexander Robertson, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23d day of July (1884), in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately at a circuit court of the United States, fourth circuit, district of South Carolina, holden at Charleston, S. C., in a suit depending in said court, between the said Emma J. Blacklock and Mary Blacklock, complainants, and Jacob Small, Alexander Robertson, and Helen R. Blacklock, defendants, a decree was rendered against the said complainants, the bill being dismissed, and the said Emma J. Blacklock and Mary Blacklock having obtained an allowance of appeal, the said Helen R. Blacklock joining therein, and filed a copy thereof in the clerk's office of the said court, to reverse the said decree in the aforesaid suit, and a citation, directed
218 to the said Jacob Small and Alexander Robertson, citing and admonishing them and each of them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Emma J. Blacklock, Mary Blacklock, Helen R. Blacklock, or either or any of them shall prosecute the said appeal to effect and answer all damages and costs if they or any of them, the said Emma J. Blacklock and Helen R. Blacklock, fail to make the said plea good,

then the above obligation to be void; else to remain in full force and virtue.

EMMA J. BLACKLOCK. [L. S.]
MARY BLACKLOCK. [L. S.]
HELEN R. BLACKLOCK. [L. S.]
C. S. GADSDEN. [L. S.]

Sealed and delivered in the presence of—
J. F. BLACKLOCK.
JENNINGS W. PERRY.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

Personally appeared before me C. S. Gadsden and makes
219 oath that he signed the foregoing bond, and that he is worth the amount included in the foregoing bond over and above all his debts and other liabilities, exclusive of his homestead exemptions.

C. S. GADSDEN.

Sworn to before me this 23d day of July, 1884.
[L. S.] J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Examined and approved.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

And on the 3rd day of October, 1884, came into court the appellants, by their solicitors, B. H. Rutledge and H. E. Young, and filed the following assignment of error, which assignment is in the words and tenor following:

Assignment of Error.

BLACKLOCK *vs.* SMALL.

The appellants in above case assign as error the dismissal of the bill by the circuit court.

B. H. RUTLEDGE,
App'l- Att'y.
220 H. E. YOUNG,
App'l- Counsel.

221 And on the — came into court the complainants and defendants, by their counsel, and filed the following agreement, which agreement is in the words and tenor following:

Agreement.

BLACKLOCK *vs.* SMALL.

J. E. Hagood, Esq'r.

DEAR SIR: In making up the record in the above case you may omit the following papers:

1. "Will — Susan B. Robertson."
2. "Marriage settlement of Blacklock & wife."

3. "Assignment of Blacklock of interest under above settlement."
4. " Will of Mrs. Rowan."
5. " Letters testamentary of B. H. Rutledge as executor of Mrs. Rowan."
6. Omit check-book, State Bank, except following stubs:
No. 724. March 19, 1861.
" 864. October 19, 1861.
" 973. April 4, 1862.
" 976. April 10, 1862.

In the pass or deposit book kept between Jacob Small and
222 the State Bank small deposits from 1861, July, and up to April 29th, 1862, are entered as follows; to wit:
April 26th. Deposit, $260.

Next deposit as follows:
April 29th. Currency, $376.

This form of entry continued until June 3rd, 1862, when the following deposit is entered:
June 3rd, 1862. Deposit, $215.

This form of entry was continued until 17th February, 1863, when the following occurs:
February 17th. Deposit Confederate treasury notes, $400.92.

The pass-book shows the payment of the checks hereinbefore set forth as given by Small to Robertson.

Yours truly,

SIMONS & SIEGLING,
S. LORD, *Of Counsel.*
B. H. RUTLEDGE,
P'r H. E. T.

223 *Citation.*

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

EMMA J. BLACKLOCK & MARY BLACKLOCK
vs.
JACOB SMALL, ALEXANDER ROBERTSON, & HELEN R. BLACKLOCK. } In Equity.

To Jacob Small & Alexander Robertson:

Your codefendant, Helen R. Blacklock, having severed and joined in the appeal taken by the said Emma J. Blacklock & Mary Blacklock, you are hereby cited & admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the second Monday in October next pursuant to a claim and allowance of appeal filed in the clerk's office of the circuit court of the United States for the district of South Carolina, wherein Emma J. Blacklock, Mary Blacklock, & Helen R. Blacklock are appel-
224 lants and you are appellees, to show cause, if any there be, why the said decree filed in this cause on the 19th day of April,

1884, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness my hand this 24 day of July, 1884.

HUGH L. BOND,
C't Judge.

[Endorsed:] United States of America, fourth circuit, district of South Carolina. Emma J. Blacklock *et al. vs.* Jacob Small *et al.* Citation. Filed 28th July, 1884. J. E. Hagood, C. C. C. U. S., dist. S. C.

I accept service for Alex. Robertson.
28th July, 1884.

H. E. YOUNG.

We accept service for Jacob Small.
28 July, 1884.

SIMONS & SIEGLING,

225 UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In Circuit Court.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing contain a true and correct copy of all the record, proceedings, and decree, &c., in the case of Emma Jane Blacklock and Mary Blacklock, complainants, against Jacob Small, Alexander Robertson, and Helen Robertson Blacklock, defendants, rendered as aforesaid (except such portions of the record as have been omitted by an agreement of the counsel in the cause.

Given under my hand and seal of said court at clerk's office in the city of Charleston, S. C., this the 7th day of October, A. D. 1884.

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
C. C. C. U. S., Dist. of S. C.

Endorsed on cover: South Carolina C. C. U. S. No. 148. Emma J. Blacklock, Mary Blacklock, and Helen R. Blacklock, appellants, *vs.* Jacob Small and Alexander Robertson. Filed 22d October, 1884.

SUPREME COURT OF THE UNITED STATES.

October Term, 1887.—No. 148.

EMMA J. BLACKLOCK, MARY BLACKLOCK, and HELEN B. BLACKLOCK, Appellants,

vs.

JACOB SMALL and ALEXANDER ROBERTSON, Appellees.

The following corrections and additions are hereby stipulated and agreed to be made to the Record in this case:

1. On page 67, fol. 187–88, for "July" read "inst."
2. On page 71, fol. 196–211, date of filing of bill in State court omitted by accident; should be "Bill filed November 17, 1869."
3. The following order in the case in the State court, being on the bill last above mentioned, omitted is to be a part of the Record in this case:

"*Order.*

"Charleston County. In Equity.

"EMMA J. BLACKLOCK, MARY BLACKLOCK, and HELEN B. BLACK-
"LOCK
"*vs.*
"ALEXANDER ROBERTSON and JACOB SMALL.

"In this case it appearing that the plaintiffs have notified the security for costs in conformity with the order of Judge Carpenter, of date May 5, 1870, it is ordered that the bill be dismissed.

"R. J. GRAHAM.

"March 7, 1871.

"Filed March 7, 1871.
"JAMES SIMONS.
"B. H. RUTLEDGE."

[Endorsed:] Sup. Court U. S. 1887, October Term. No. 148. Emma J. Blacklock & *al.*, app'ts, *vs.* Jacob Small *et al.* Stipulation to correct Record.

[Stamped:] Office Supreme Court U. S. Filed April 9, 1888. James H. McKenney, clerk.

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FILED:
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CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 148.

EMMA J. BLACKLOCK, MARY BLACKLOCK, AND HELEN R. BLACKLOCK, APPELLANTS,

vs.

JACOB SMALL AND ALEXANDER ROBERTSON, APPELLEES.

ARGUMENT OF APPELLANTS.

STATEMENT. 1

I. John F. Blacklock was a citizen of South Carolina, and a man of wealth. In March, 1860, he sold his residence in Bull street, in the city of Charleston, to Jacob Small, for $16,000. It was his purpose to go abroad with his family, which consisted of three unmarried daughters, Emma, Mary and Helen, for an indefinite period. The terms of the sale were one-third cash, which was paid, and the balance in a bond for $10,600, payable in three equal successive annual instalments. This bond and mortgage he assigned to his brother-in-law, and partner, in the firm of Robertson, Blacklock & Co., "Alexander Robertson, in trust for the children 2
of John F. Blacklock." The children of Mr. Blacklock, were the said Emma, Mary and Helen; all of them minors at the time; Emma, not reaching full age until November, 1861; Mary, in December, 1865, and Helen in August, 1869. Of this assignment for their benefit, the ladies were not aware until long afterwards. In May, 1861, Mr. Blacklock went with his family to England, and remained there with them until October, 1866, when he and they returned to Charleston, South Carolina.

II. Meantime the Confederate war intervened, and these circumstances occurred. In October, 1861, Mr. Small paid 3
on this bond $3600; on 4th April, 1862, $2,000, and on the

10th April, 1862, the balance, $5,000, in depreciated currency, by checks on a bank which had suspended specie payments, and whose notes were below par. On the said 10th April, 1862, Mr. Robertson receipted the bond in full, and satisfied the mortgage in this form: "Alexander Robertson, trustee for the children of John F. Blacklock," and delivered both papers to Mr. Small.

III. There was no just reason for this proceeding. The
4 bond was amply secured. The investment was absolutely safe then. The trustee had no debts to pay. He could not pay it over to the beneficiaries, for two of them were infants, and all were abroad. He tried and was unable to remit any funds to them. (Folio 102.) He could make no use of the money. There were no satisfactory investments to be had, in which he could place it. He invested "in Confederate bonds." (Folios 103-104.)

Notwithstanding this, he not only accepted such depreciated currency in payment of a gold debt, fully secured, but allowed Mr. Small to anticipate the payment of the last instalment. Mr. Small was perfectly aware of these circumstances;
5 knew that he was dealing with a trustee, and states distinctly "that he never could have forced it upon Mr. Robertson, if he had not consented to receive it." During all this time neither the Misses Blacklock, nor their father, heard anything about the matter. They never received a cent of remittance in any form or shape. Indeed the beneficiaries were not aware of the trust for their benefit until they returned to Charleston in 1866. (Folios 158–159–168 to 170.) They then discovered it, and discovered also that Mr. Small had their property for nothing, and that they had lost their property and got nothing.

6 V. They took legal advice. The situation was embarrassing. A stay law prevailed in South Carolina, which prevented relief in the Courts until after December 21, 1866. In 1867 they notified Mr. Small of their disapproval of the transaction (fol. 170 to 172). They took no further immediate steps to assert their rights, because, by an unbroken current of decisions of the South Carolina Courts, trustees were not only authorized to receive currency in payment of debts due the trust estate, but it was declared to be their duty to do so. The plaintiffs thought the attempted payment a fraud upon their rights. If so, they had four years after discovery within which to move. In 1868 the Recon-
7 struction Constitution was adopted; the *ante-bellum* Supreme Court of the State was dissolved, and a new Court, repre-

senting other and different ideas, was inaugurated. The plaintiffs filed their bill for relief in December, 1869. Sometime afterwards, while that bill was pending, the newly organized Court pronounced a decision, reasserting the validity of payment of debts to trust estates in currency. The plaintiffs, as soon as this decree came to their notice, ceased to press their case. It was vain to court certain defeat. Two separate Supreme Courts of South Carolina, framed on different principles, and the exponent of opposing theories, both united in declaring that payments of any sort, when accepted by 8
the trustee, discharged the debtor. There was no Federal question involved, by aid of which the judgments of the State Supreme Court could be reversed.

The beneficiaries were helpless. Without approving or acquiescing, they bowed to the inevitable, and became silent for no other reason than that it was no use to speak.

V. In 1878 Mrs. Carson's case was decided by this Court. Then, for the first time, they saw hope of relief. With alacrity, and in spite of the most serious obstacles and drawbacks, the plaintiffs changed their citizenship, and appealed for help to the Courts of the United States. Penetrated with the con- 9
scientious conviction that they have been subjected to great wrong and injustice, they have at no time relinquished the hope of redress, and have diligently sought and pursued every practicable opportunity to secure it.

Mr. Small has, by an illegal act, obtained possession of the bond and mortgage of the plaintiffs, retains them, and refuses to deliver them to the plaintiffs, who are the rightful owners.

The suit was duly tried, and on 19th April, 1884, it was "ordered and decreed that the bill of complaint herein be dismissed with costs," by his Honor, Judge Bond. The decree being in such form, plaintiffs assign as error

"The dismissal of the bill by the Circuit Court." 10

CASE OF PLAINTIFFS.

The efficient prayers of the plaintiffs are: Alex. Robertson being insolvent, that Jacob Small be required, first, to deliver up the bond and mortgage to plaintiffs—the ground on which he retains possession being without validity, "either to give or take away rights"—and thereupon that the plaintiffs have leave to ask for a decree for payment of the bond and foreclosure of the mortgage.

The claim of the plaintiffs is inevitable: and they are entitled to a decree for the specific delivery to them of the papers 11
in question—with such other relief incident thereto as the

Court may see fit to give them—*unless* some one of the claims set up by the defendant, Small, is available to defeat that of the plaintiffs.

THESE DEFENCES ARE:

PAYMENT.
STATUTE OF LIMITATIONS.
ACQUIESCENCE AND CONFIRMATION.
12 STALE CLAIM.

AS TO DEFENCE OF PAYMENT.

Mr. Small claims that he paid the bond, and that the papers belong to him. In what way?

The bond was for $10,600, and to be paid in three equal successive annual installments. The date was 20th March, 1860. Payments made as follows: 18th October, 1861, $3,600; 4th April, 1862, $2,000; 10th April, 1862, $5,000. These payments were made by checks on the State Bank,
13 where Small kept his accounts.

Fol. 116–117–103–105.

Robertson deposited them to the credit of Robertson, Blacklock & Co. in the Bank of Charleston, where he did his business, and of which he was a director. (Fol. 104 to 105.)

The State Bank suspended specie payments on 29th November, 1860 (fol. 79–81–73–74), and the Charleston Bank suspended in latter part of 1861. (Fol. 105 to 106.)

September 6, 1861, all the banks in Charleston joined in resolutions that from that date they would only give credits and pay in currency. (Fol. 79–81.)

14 The currency was Confederate or bank bills, that "ran parallel in the banks."

Fol. 83–84–104–105.

The bills of the State Bank, and all the Banks were below par after suspension, and Confederate currency after October, 1861.

Fol. 73 to 77–103 to 106.

The prescribed time for the payments of the installments were 20th March, 1861, 1862, 1863, respectively. The first installment was not paid until October, 1861, and the two last
15 within six months afterwards.

Small *knew* he was dealing with a trustee. The fact was

in full view *on the face of the papers and throughout the transactions.*

Magwood vs. R. R. Bank, 5 So. Ca. R., 391.
Shaw vs. Spenser, 100 Mass.
Lowry vs. Com'l Bank, Taney's Decisions, 330, 333, 334, 336.
Hughes vs. United States, 4 Wall, 232.

He *knew* that this money was not legal tender, even under the constitution of the Confederate States. He *knew* it was below par, and he admits distinctly that he "never could have forced it upon Mr. Robertson if he had not consented to receive it. 16

The law of this Court on this subject is established.
Ward vs. Smith, 7 Wall, 451.
Horn vs. Lockhart, 17 Wall, 581.

The entire transaction is "an absolute nullity."
Hickman vs. Jones, 9 Wall, 201.

It was "as if it were not—a mere nullity."
Davis vs. Perdicaries, 96 U. S., 195 and 196. 17

"It was utterly void, and gave no rights, and took away none." * * A *caput mortuum*, and nothing can give it validity." "A thing void as to all persons and for all purposes can derive no strength from confirmation."
Carson vs. Robertson, 99 U. S., 570.
Fretz vs. Stover, 22 Wall., 207.

The attempted payment was "a void act." The acceptance of such payment by the agent is a fraud, and invalid; and whether there was collusion or not in the transaction, is immaterial, "the transaction itself was invalid." 18

Glasgow vs. Lipse, 117 U. S., 333:
"It is undoubtedly true that an executor is chargeable with the utmost good faith in dealing with the estate entrusted to him. He cannot wantonly neglect or squander it by useless expenditures, or suffer it to go to waste, without incurring personal liability for the consequent depreciation. Nor can he call in good investments when the money is not needed. Nor accept the payment of debts for less than their face value, when the full amount can be recovered without unnecessary delay and expense; nor in depreciated currency, when better currency can be had, *unless* it can be advantageously used in meeting expense, discharging debts, paying legacies, and the 19

like. In all such cases he would be chargeable with a devastavit. He may, however, take payment of a debt, when *not secured*, in the best money he can get, when its safety requires its collection. Under these limitations he must do what, under the circumstances and situation, prudent men managing their own estates would do; and when doubting, seek the authority and direction of the proper Court. With respect to transactions during the late war, he could not, under any circumstances, invest in Confederate securities, property or
20 lawful money already in his hands. If he fails in the discharge of his trust he is liable to parties injured thereby, as all trustees are liable in such cases. *And parties combining and confederating with him to despoil the estate in any way may be held* as participants in the devastation and breach of trust. We may even concede the doctrine declared by the Court of Appeals of Virginia, that a debtor who pays to an executor in depreciated currency a debt payable in gold, or its equivalent, knowing at the time that the currency is not needed for the payment of debts or legacies, or other uses of the estate, and that the safety of the debt does not require its collection, may also be charged as a participant in the devastavit. The
21 present case does not come under the doctrine. It falls within the class where, for debts payable in lawful money, the depreciated currency of the country where they were contracted, and the executor resides, can be used at its face value in payment of legacies, and therefore may be accepted by him without a breach of trust," &c.

The case in hand falls directly within the lines of the general doctrine.

The trustee called in a good investment when the money was not needed. He accepted payment in depreciated cur-
22 rency, when the debt was perfectly safe and secured by an ample mortgage of real estate in the city of Charleston. When there were no expenses to meet, no debts to be paid, and when he could not pay it over to the parties, nor even reinvest it satisfactorily.

Mr. Small knew that the debt was safe; that he was dealing with a trustee, and that such collection of it substituted a doubtful, perilous, and revolutionary currency in his hands in place of a certain and undoubted security. *The debt is not* PAID, and Mr. Small in his attempted payment, under such circumstances "took away no rights," (Davis vs. Perdicaries)
23 and achieved "a void act" only. Fretz vs. Stover.

Mr. Small was notified in 1867, that the transaction was disapproved and objected to by plaintiffs, and that they claimed the debt, notwithstanding the acts of the trustee, fol. —, and suit was instituted on the claim in the State Court in 1869, fol. —.

AS TO DEFENCE OF STAT. LIMITATIONS.

The bond being unpaid, plaintiffs are entitled to recover; unless in some way they have lost their rights. 24

The Stat. Lim. is alleged as a bar.
The *facts* relevant to this issue are:
A Stay Law prevailed in So. Ca., till 21st Dec., 1866.
Harlee vs. Ward, 15 Rich. L., 239.
Cleveland vs. Mills, 9 So. Ca., 435.
Hayes vs. Clinkscales, 9 So. Ca., 450.

Suit brought in the State Court, (fol. —.) December 1869.

This suit discontinued for failing to put in security for costs, March, 1871. 25

Present suit in U. S. Court, (fol. —.)

There was no Statute Law in South Carolina applicable to bonds affecting this case. The only limitation of suits on such instruments was this: When no payment of principal or interest had been made on the bond for twenty years after its maturity, or in case of any such payment twenty years thereafter, the law in the absence of evidence raised a presumption of payment. No such presumption is available here, as twenty years had not expired when suit was brought, and there is full and direct evidence of all the facts. In this case 26 such a presumption could only have had currency from the expiration of the Stay Law, on 21st December, 1866.
Wardlaw vs. Buzzard, 15 Rich. So. Ca. R., 158.
Carroll vs. Green, 92 U. S., 511.

It is claimed, however, that the transaction is either a fraud on the part of Mr. Small, or it is not. If not, why this contention?
If a fraud, the plaintiffs had notice of it, and failed to bring suit within four years after its discovery, and are barred.
The apparent dilemma is specious, but delusive.
(*a.*) The transaction is not a technical fraud such as the 27 rule contemplates, but an act absolutely void, which "gave

no rights;" "took away none;" "a mere nullity;" and as if it had never been done.

The expressions used to designate the legal character of the act in question, in the various cases decided in this Court, show this. It is declared to be "a void act;" "an absolute nullity;" "as if it were not;" an act "utterly void, that gave no rights, and took away none;" "a *caput mortuum*, to which nothing can give validity;" "a thing void as to all persons and for all purposes, that can derive no strength
28 from confirmation," &c., &c. It is similar to the distress in Deshler's Case, 16 How. The distress gave no rights, because it was illegally issued. This act gives no rights, because it was void *ab initio*, and is, legally, as if it had never taken place. It is an act simply without warrant of law whatever—an illegality liable to be repudiated whenever brought to the notice of a Court.

It is true, the idea of fraud is disclosed in two of the cases: In Carson vs. Robertson, 99 U. S., and in Fretz vs. Stover, 22 Wall, 207. In each case the Court is particular to declare that the element of fraud was indifferent to the decision, as it would be the same whether fraud existed or not.
29 In Carson vs. Robertson the language is, "There was evidently a plot—McBurney & Co. were its contrivers, Ball was their instrument, Robertson was their dupe, and the Carsons the victims. * * * * But "*in its strictly legal aspect, it is equally free from doubt.*" In Fretz vs. Stover, "If Chilton could not *receive* payment of the bond in Confederate paper and Virginia bank notes, neither had Stover the right *to pay* them. *It was a void act on his part to attempt to discharge his debt in this way*, as well as a *fraud in Chilton* to suffer him to do so. * * * "It is impossible to escape the conviction that there was collusion between Chilton and Stover in the transaction. *But whether this be so or not, the transaction*
30 *itself was invalid.*"

Fraud in the cases mentioned was *an accidental circumstance.* The judgment on them would have been the same without its presence as with it. The law or the United States in this particular rests, *not upon fraud*, but upon reasons drawn from, and upon which the integrity of the Republic depends. The recognition of such payments as legal is repugnant to the genius of the Government. The act in question is not a fraud within the contemplation of the rule invoked.

The position of the parties in this connection is that simply of one who does an act (in reality and law of no moment), but which, in his opinion, is payment of his bond, and which
31 the bond creditor tells him he does not recognize as such.

The bond creditor has twenty years within which to take what steps he pleases to test the question.

(*b.*) But if it is a technical fraud, the four-year limitation is not available, "because the fraud, if it existed, was not known sufficiently early." (Brown vs. County of Buena Vista.) *Infra.*

The rule requires that the party to be affected by its operation must have *notice* of the facts constituting the fraud, sufficient to put a reasonable man on inquiry, and the burden of proving this on the defendant, Small. (McLure vs. Ashby, 7 Rich. Eq., (So. Ca.,) 442–3.

32

This rule, like all Stat. of Limitation, is based upon the "*negligence*" of the party. "*The ground* upon which Courts of Equity apply the Statute of Limitations *is the laches* of the *plaintiff*. He is required to prosecute with reasonable diligence."

Shannon vs. White, 6 Rich. Eq., (So. Ca.,) 10.

These parties were informed by two distinct and different Supreme Courts of the State to which they belonged—organized on different principles, and representing different influences, that there was *no fraud* in the matter, and that payment by Small was a legal discharge of the bond." 33

"It was *the duty* of the administrator to invest such otherwise idle money, and the particular form of investment *in Confederate bonds*, was *in conformity with his duty, as has been now repeatedly held by this Court.*"

McLure vs. Steele, 14 Rich. Eq., (So. Ca.,) 118.
McPherson vs. Lynah, Ib., 121.

Pearce vs. Venning, 14 Rich. Eq., 84, decided February, 1867—appeal in 1868—held that a trustee could, in January, 1863, receive payment of a well secured bond in Confederate money, and re-invest the amount in Confederate bonds—Adams vs. Latham, and Snelling vs. McCreary—to same effect. 34
The Circuit decrees were in 1866 and 1867, and the Appeal decrees in 1868.

Upon the change of judiciary under the Reconstruction laws, that Court decided "That the *trustee* committed a breach of trust in receiving payment of the bonds in Confederate treasury notes, and investing the proceeds in bonds of the Confederate States, and that *he* was liable to account to the *cestui que trust* for the sums received. BUT "That the obligors in the bonds were not liable to account to the *cestui que trust. for that they were discharged by their payments to the trustee.*"

Mayer vs. Mordecai, 1st So. Ca. R., 383. 35

Was there anything to excite inquiry in this? Was there not everything to crush it out? The highest legal authority of their State, instructed them, on two distinct and separate occasions, and from two differing stand-points, that they had *no rights*, and there had been no fraud committed on them.

"How can laches be imputed to him who is ignorant of the fraud?"

Shannon vs. White (supra.)

36 This Court has held in Marsh vs. White, 21 Wall, 182: "An attorney cannot be charged with negligence, when he accepts as a correct exposition on the law a solemn decision of the Supreme Court of his own State."

A *fortiori* the rule should apply to citizens not professionally informed.

Federal Courts generally apply the same construction to Stat. of Limitations as the State Courts do, and if this rule is observed, the Statute cannot apply.

"The fixed and received construction of the State Courts of
37 local Stat. of Limitations furnishes rules of decision for this Court, so far as such construction and statutes do not conflict with the Constitution of the United States."

Davie vs. Briggs, 99 U. S., 637.

Stat. of Limitations "are not obligatory upon this Court, and do not apply to proceedings in equity, *except so far as the Court has thought it conducive to the ends of justice* to apply them in analogy to the rules which prevailed in a court of law. It applies them only by analogy to the practice at law, and *it does not apply them when sound conscience would be offended by its* application."

38 McLure vs. Ashby, 7 Rich. Eq., (So. Ca.,) 439, &c.

Sullivan vs. Portland, R. R. Co., 94 U. S, 811. } *Infra.*
Brown vs. County Buena Vista, 95 U. S., 161. }

Proclaim similar doctrines.

It is contrary to "sound conscience" in such circumstances to hamstring the rights of parties acknowledged by the law of the United States, by the rigid application of a technical rule of law, in favor of a party who by U. S. law has not discharged his debt, either by payment or presumption against another who has become apparently obnoxious
39 to its influence by reason of erroneous representations of law from the Supreme Court of the State of which he is a citizen.

United States Courts follow in proper cases State limitations. The State law requires suit to be brought within four years after discovery of fraud. But in this case, by the State law, *there is no fraud to be discovered;* therefore no subject upon which this Statute can operate. Assume for the sake of argument on this point that the act in question is a fraud in the Federal Courts. To apply the Statute requires that the State law be reversed or disregarded as it now stands, so that the Statute may become applicable. Otherwise the Federal Court is called upon to import an inoperative State 40
Statute into its jurisdiction for no other purpose than to enforce the law of the State instead of the law of the United States.

The effect of such decision would be to enable a party by indirection, to defeat the law of the United States and enforce the law of South Carolina, in opposition to and in defiance of it. *If so, the law has become a slave to practice and a heretic to principle!*

(*c.*) The rule that the Statute of Limitation runs in favor of a direct trustee, from the date when he did some act which broke the trust relation, of which the *cestui que trust* had 41
notice, and which put them at arms-length with him, does not apply.

For expression of that rule:
Story's Eq. Juris., 1520, a.
Riddle vs. Riddle, 5 Rich. Eq., (So. Ca.,) 30.
Brockington vs. Camlin, 4 Strob. Eq., (S. C.,) 196.
Moore vs. Porcher, Bail. Eq., 196.
Pettus vs. Clawson, 4 Rich. Eq., 101.
Sperdel vs. Horner, 120 U. S., 386.

The trustee was still able to collect the debt, if he chose 42
to do so, because there was no Statute of Limitations proper on a bond in the law of South Carolina; only the twenty years' presumption of payment, which had not expired, the bond having matured in March, 1863, and the last payment having been made in 1862; and admitting that, by the operation of the rule, the trustee was released—the debtor to the trust estate was not—the limitation provided by law or practice for his protection not having expired, and the debt being unpaid.

The only mode of release to the debtor was discharge of his debt, either by payment actual, or payment presumptive. The twenty years' presumption is the limitation protecting 43

him. If that had expired, as against the trustee, the debtor would be released.

Meeks vs. Oliphant, 100 U. S., 569.

If not, the unpaid debt is still due, and the debtor cannot hide himself under a rule with which he has no connection, and which is designed as a limitation protection to direct trustees who have no other, in qualification of the general rule, that Statute of Limitations have no currency in favor of
44 that class of trustees.

Sperdel vs. Horner, 120 U. S.

"Courts of Equity not only act in obedience and in analogy to the Statute of Limitations in proper cases, but they interfere in many cases *to prevent* the bar of the Statutes where it would be inequitable or unjust. Thus, for example, if a party has perpetrated a fraud, which has not been discovered until the statutable bar may apply to it at law, Courts of Equity will interfere and remove the bar out of the way of the other injured party. A *fortiori* it will not allow such a bar to prevail by mere analogy to suits in Equity, where it would
45 be in furtherance of manifest injustice. Thus, if a party apply to a Court of Equity, and carry out an unfounded litigation, protracted under circumstances and for a length of time, which should deprive his adversary of his right to proceed at law, on account of the Statute of Limitations having, in the intermediate time, run against it, Courts of Equity would themselves supply and administer, within their own jurisdiction, a substitute for that original legal right of which the party had been thus deprived, and by their decree give him the fullest benefit of it."

13th Edit. 2 Story's Eq. Juris., § 1521.

46 A Stat. of Limitation of no kind or character applies to this case; and if it does, technically, it ought not to be allowed to do so in Equity.

AS TO DEFENCE OF ACQUIESCENCE AND CONFIRMATION.

Law of the Subject.

"Acquiescence and release or confirmation, to have the effect we have mentioned, must be understood to be accompanied with the following conditions: (1.) The C. Q. T.
47 must be *sui juris*, and not *feme covert* or infant, and *in the case of infants, the Court continues its protection* even after they

have attained twenty-one, till such time as they have acquired all proper information. (2.) The C. Q. T. must be fully acquainted with *all the facts* and circumstances of the case. (3.) The C. Q. T. must not only be acquainted with all the facts, but be also apprised *of the law, or how those facts would be dealt with if brought before a Court of Equity.*"

Lewin, S. P., 778.
Hill Trustees, S. P., 382.

"It has been argued that the defendants being aware of 48
the facts of the case, Sir Henry Englefield has, *by his silence and being a party* to the application to Parliament, confirmed the title of the plaintiff. In equity it is considered, as good sense requires it should be, that no man can be held by his own act to confirm a title, *unless* he was fully aware at the time, not only of the facts upon which the defect of title depends, *but* of the consequences in point of law, and here there is no proof that the defendant at the time of the acts referred to, was aware of the law on the subject, nor was it ever alleged in the argument."

Lewin, p. 778.
Cockerel vs. Chomley, 1 Russ. and Mylne, 425. 49
(S. C.) 3 Russell, Eng. Ch. R., vol. 3, 574.

(Same case.) Upon this doctrine of confirmation and acquiescence we must distinguish. An express ratification may be *proven*, and entire acquiescence may be *inferred*. The latter may arise from lapse of time, omission to complain, and other circumstances; the former is simply to be established by evidence. *But both equally depend for being effectual* on the fact that the party had, (1) full and perfect knowledge of all his rights; (2) of all the facts of his case; (3) *and of his ability to procure relief by application* to the Courts of Justice."

50

"No principle is better settled than that a party is *not estopped by silence*, unless it has misled another to his hurt."

Railroad Co. vs. Dubois, 12 Wall, 64.

"The only case on which I shall make any particular comment is that of Hunt vs. Rousmanier, 8 Wheat. 215, in which the point is expressly decided in the opinion delivered by Ch. J. Marshall, in which he refers to some of the English cases which have been relied on in the argument, and says "although we do not find the naked principle that relief may be granted on account of ignorance of law asserted in the books, we find no case in which a plain and acknowledged mistake 51
of law is beyond the reach of equity," and surely no case can

prove more clearly that such mistake is not beyond the reach of law than the case of Lansdowne vs. Lansdowne Moseley's Rep., 346. The ignorance in that case was that the complainant was entitled as eldest son to the estate, and yet relief was afforded in so plain a mistake."

Lowndes vs. Chisolm, 2 McC. Ch., 463, (S. C.)
Snell vs. Ins. Co., 98 U. S., 90 and 91.
Hopkins vs. Mazyck, 1 Hill Eq., (S. C.,) 251.

52 "The English Courts evidently regard with favor this branch of equity jurisprudence, (mistake of law.) The very latest decisions of the English Courts treat it as a recognized and highly beneficial branch of remedial justice."

Storys Eq. Juris., Sect. 138–g.

"When parties come to this Court to be relieved against the consequences of a mistake of law, it is I think the duty of the Court to be satisfied that the conduct of the parties *has been determined* by those mistakes, otherwise great injustice may be done."

53 Stone vs. Godfrey, 5 DeGex, p. 90.

See also
Marsh vs. White, 21 Wall., 181 (*supra*).
Dunlap vs. Ball, 2 Cranch, 189.
Upton vs. Tripplecate, 1st Otto, 45.
Campbell vs. Holt, Fed. Rep., Vol. VI, No. 7, p. 213.

"This doctrine of estoppel *in pais*, or equitable estoppel, *is based upon a fraudulent purpose and a fraudulent result. If*, therefore, the element *of fraud is wanting, there is no estoppel.*
54 As if both parties were equally conversant of the facts, and the declaration or silence of one party produced no change in the conduct of the other, he acting solely upon his own judgment. *There must be deception and change of conduct in consequence, in order to estop the party* from showing the truth."

2 Story's Eq. Juris., Sect. 1543.

"There is, therefore, no case for the application of the doctrine of equitable estoppel. For its application there must be some *intended deception* in the conduct or declarations of the party to be estopped, *or such gross negligence on his part as to amount to constructive fraud.* An estoppel *in pais* is some-
55 times said to be *a moral* question. Certain it is that to the enforcement of an estoppel of this character, such as will

prevent a party from asserting his legal rights to property, there must generally be *some degree of turpitude in his conduct, which has misled others to their injury. Conduct or declarations founded upon ignorance of one's rights have no such ingredient.*"

Henshaw vs. Bissell, 18 Wall., 271.

Lord Mansfield says: "How can a thing *void* in its origin, be rendered valid by any thing done to it afterwards."

Lowe vs. Walker, 2 Doug., 736.

56

"A transaction originally unlawful cannot be made any better by being ratified."

United States vs. Grossmaker, 9 Wall., 75.

"A thing void as to all persons, and for all purposes, can derive *no strength* from confirmation."

Dewing vs. Perdicaries, 6th Otto, 195.

The substance of all which is that to constitute acquiescence or confirmation, "equitable estoppel," the claimant must have had "perfect knowledge of all his rights," "of all the facts of the case," "of his ability to procure relief by application to the Courts of Justice. Must not have been misled by an honest and inevitable mistake of law, and must be chargeable with fraud of some description. Mere silence does not create it, and there must be deception and change of conduct in consequence, in order to estop the party from showing the truth." "Some degree of turpitude in the conduct of the party to be affected by it, which has misled others to their injury. And under no circumstances can an act originally void be validated either by confirmation or acquiescence."

57

Do these elements or any of them affect the conduct of the claimants in the present case?

58

They did *not* have knowledge of their rights, nor of the possibility of their procuring relief from the Courts, on the contrary, were instructed when they applied for relief by reiterated judicial asseveration from the highest authority of their State that they had no legal rights. Were entirely misled themselves, and did no act whatever, which misled Mr. Small to his injury or *in consequence of which* he has made any change in his conduct. "*It does not lie in the mouth of the wrong doer to complain of delay, unaccompanied by acts of ownership and by which he has not been affected*"

Pierce vs. Langdon, 99 U. S., 581.

59

It may be said, however, that they acquiesced or confirmed the transaction, because they submitted to the decree dismissing the bill in the State Court for not complying with the order requiring security for costs.

That order is as follows:

"In this case it appearing that the plaintiffs *have not filed the security for costs* in conformity with the order of Judge
60 Carpenter, of date, May 5th, 1870. It is ordered that the bill be dismissed."

(Signed) R. F. GRAHAM.

March 7, 1871.

THE LAW OF THE SUBJECT.

The plaintiff is "in contempt of Court" in not complying with the order *requiring security for costs*, and is liable to a motion and decree of dismissal for want of prosecution. Such a decree is "merely a discontinuance and is no more than a nonsuit at law, and does not prevent the bringing of a
61 new suit."

1 Dan. Ch. Pr., 5 Amer. Edit., p. 659, bp. 631 and notes.
1 Dan. Ch. Pr., 5 Amer. Edit., p. 811, bp. 776.
1 Dan. Ch. Pr., 5 Amer. Edit., p. 796 and 7, bp. 760, 1 and 2.
Brandlyn vs. Ord, 1 Atkyns, 571.

His Lordship laid it down as a rule, "that where the defendants plead a former suit, that the Court implied there was no title when they dismissed the bill, is not sufficient, they must show it was *res adjudicata*, an absolute determination in the Court that the plaintiffs had no title. * * * And that a bill
62 dropped for want of prosecution is never to be pleaded as a decree of dismission in bar to another bill."

Mitford's Eq. Pl., 238.

Durant vs. Essex Co., 7 Wall., 109:

"The decree dismissing the bill in the former suit, in the Circuit Court of the United States, being absolute in its terms, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate
63 remedy at law, *or upon some other ground which does not go to the merits*, is a final determination. Where words of qualifi-

cation, such as without prejudice, or *other terms indicating* a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits. Accordingly, it is the general practice in this country and in England, when a bill in Equity is dismissed, without a consideration of the merits, for the Court to express in its decree that the dismissal is without prejudice. The omission of the qualification in a proper case will be corrected by this Court on appeal. In the case in the Circuit Court we are not left to conjectures, or to presumptions, as to what was intended by the decree," &c., &c. 64

Dunsford vs. Brown, 23 So. Ca., 334—same principles:

It is so here. The dismissal was not on the merits, and it is so specified in the order. It was simply for non-compliance with the order to put in security for costs. As a plea in bar, it is not available.

As an indication of acquiescence, it is preposterous. The security required for costs, ordinarily, is $50. An equitable nonsuit was allowed, for the express purpose of avoiding a decision on the merits, after promulgation of the decision in Mayer vs. Mordecai, which would necessarily have accomplished *res judicata.* 65

Further, unless the numerous successive rulings of this Court, made and repeated from time to time for a series of years, without a variance or shadow of turning, are delusive; the attempted act was originally void, and cannot be validated, either by confirmation or acquiescence.

This defence is baseless!

AS TO DEFENCE OF STALE CLAIM.

Law on the Subject.

Sullivan vs. Portland R. R. Co., 94 U. S., 811: 66

"To let in the defense that the claim is stale, and that the bill cannot therefore be supported, it is *not* necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case as it appears at the hearing is liable to the objection by reason of *the laches* of the complainants, the Court will upon that ground be passive, and refuse relief. *Every case is governed chiefly by its own circumstances;* sometimes the analogy of the Statute of Limitation is applied. Sometimes a *longer* time than that prescribed by the Statute is required. In some cases a *shorter* time is sufficient; and sometimes the rule is applied when there is no statutable bar. It is competent for the Court to apply the 67 inherent principles of its own system of jurisprudence, and to

decide accordingly. (See cases cited.) A Court of Equity, which is never active in giving relief *against conscience* or public convenience, has always refused its aid to stale demands when a party has *slept* upon his rights and acquiesced a great length of time. *Nothing can call forth this Court into activity but conscience, good faith,* and reasonable diligence. When these are wanting, the Court is passive and does nothing. *Laches and neglect* are always discountenanced; and, therefore, from the beginning of this jurisdiction there was
68 always a limitation to suits in this Court."

Brown vs. County of Buena Vista, 5 Otto, 161:

"The Satute of Limitations of Iowa, of five years, perhaps *does not apply, because the fraud, if it existed, was not known sufficiently early.* The Statute could run only from the time of discovery. *But a Court of Equity applies the rule of laches according to its own ideas of right and justice. Every case is governed by its own circumstances.* Whether the time the negligence has subsisted is sufficient to make it effectual, *is a question to be resolved by the sound discretion of the Court.* * * The law of *laches*, like the principls of limitation of actions,
69 was dictated by experience, and is founded on a salutary policy. The lapse of time carries with it *the memory and life of witnesses, the muniments of evidence, and other means of proof.* The rule which gives it the effect prescribed is necessary to the peace and welfare of society. A departure from it would open an inlet to the evils intended to be excluded."

Lansdale vs. Smith, 106 U. S., 392.
Sperdel vs. Herner, 120 U. S., 386.
1 Story's Eq., 529.
Fonblanque's Eq., Vol. 1, Ch. IV, Sect. 27.
Jeremy's Eq. Juris., Book III, Part 2, Ch. 5.

70 The result is: If there is difficulty of "doing entire justice," "because the original transactions have been obscured by time" (1 Story's Eq., 529), "*or* the evidence has been lost," since it would be too hard to force a man to keep his evidence by him forever" (Fonblanque's Eq.), "*or* there is want of conscience and good faith, or of reasonable diligence" (Sullivan vs. Portland), the Court, for reasons *of public policy*, will decline to move. Whether these do intervene or not, the Court will determine by "its own sound discretion."

Brown vs. Buena Vista.

The basis of stale claim is, that the Court finds itself in a
71 position where, from dearth or uncertainty of facts, it is liable, if it acts at all, to do injustice instead of justice; which em-

barrassing situation has been brought about by the negligence of the party in not moving at an earlier day. Time is *one* element in determining whether the doctrine applies or not; but it is by no means the most potential. A case may properly be declared stale after the lapse of six or seven years, when under a different set of circumstances, it would be in antagonism to the principles of the jurisdiction so to declare it after the passage of thirty years. Its just application depends altogether upon circumstances, and rests in the sound discretion of the Court. In this case there is no pretence that there 72
is a want of good conscience on the part of the plaintiffs.

The facts are undisputed, and are as completely in the possession of the Court as if the bill had been filed in reference to transactions a week old. There has been no death of witnesses—no loss of documents—no obscuration of evidence by time—and consequently no more fear of the Court being trapped into error, than if the claim had been brought to trial in 1866. The plaintiffs have done no act which influenced Mr. Small's conduct to his injury. Why then is the claim stale? Want of reasonable diligence?

There is certainly not a fibre of ground for this charge in their proceedings up to the discontinuance of the bill in the 73
State Court in 1871. It would have been puerile to go on with that case after the rendition of the decree in Mayer vs. Mordecai; it being impracticable from the absence of a Federal question to reach this tribunal.

They were judicially informed by the State tribunals that they had no rights. If this declaration of law was correct (and are they blameworthy for being influenced by the proclamation of the highest authority of their State, which, under the Constitution of their State, was the oracle of their rights,) why waste their few resources in pursuit of an *ignis fatuus* in any other direction?

If the law should be declared otherwise in the Federal 74
Jurisdiction—they were not aware of it—and they had time enough to learn it before a presumption of payment would legally arise on the bond. *They merely kept silence* and did no act, by which the conduct of the defendant was affected, and he misled to his hurt. This silence lasted from 1871 to 1879, when the decisions in Mrs. Carson's case appeared, and they acted as expeditiously as was practicable.

In what respect have the plaintiffs failed in reasonable diligence?

Inactivity is not reprehensible *per se*. At times it is said to be "masterly." It is only when pernicious consequences follow in its wake that it falls under the ban of the law. 75

The position of the Court is unembarrassed by lost or defective evidence. The case with all its facts is squarely before

it, and subject to its sound discretion according to the principles adjudged in Sullivan vs. Portland, and Brown vs. Buena Vista.

Dunlop vs. Ball, 2 Cranch, 180:

This case is worthy the attentive consideration of the Court, as indicative of the result of judicial thought in circumstances singularly analogous to the present.

The bond in the above case was dated 1773. Payments on
76 it stopped 5th September, 1775. Suit was begun in 1802 (27 years later). The war closed in September, 1783 (19 years). The plaintiff had in Virginia all the while an agent to collect the bond. Admitting every allowance claimed, more than 20 years had elapsed since the last payment. The Court, notwithstanding, held the plaintiffs entitled to recover.

The elements calling for the exercise of humane judicial consideration are much stronger in the case before us. Dunlop's case was at law. Upwards of 20 years had fully expired on the bond. The treaty of peace, 1783, between the two countries had provided for the recovery of debts due English subjects. Only *the County Courts* of Virginia held
77 that they could not be recovered. The Appeal Court of the State reversed these.

In the case in hand there was a like "general understanding" that debts of this kind could not be recovered from those paying them, based in the first instance on the decisions of the Circuit Courts, and somewhat later this belief became confirmed and fixed by the judgments of the Supreme Courts of the State already described.

Reasons of a similar character, but more potent, controlled and determined the actions of the Blacklocks up to the filing
78 of this bill, to those which restrained Dunlop.

Is it just, in accord with sound discretion, that laymen (women) be held guilty of negligence when a lawyer in like circumstances is not.

Marsh vs. Whitman, 21 Wall, (*supra.*)

The case is sufficiently conclusive as it stands, in this respect, but it is not out of place to say that poverty weakens the presumption of negligence.

Perry on Trusts, 867.
Crowe vs. Ballard, 1 Ves. S., 215.
79 Grawland vs. de Ferrier, 17 Ves. Jr., 24.
Roche vs. O'Brien, 1 Ball & B., 54.
Hillay vs. Walker, 12 Ves., 266.

JURISDICTION QUESTION.

John F. Blacklock, assignor, at the time of the assignment, was a citizen of the State of South Carolina, and continued to be such until this suit was commenced.

Jacob Small is a citizen of South Carolina.

Emma Jane Blacklock and Mary Blacklock, plaintiffs, are citizens of Georgia.

Act of Congress March 3, 1875:

"Any suit *founded on contract* in favor of an assignee, 80
unless a suit might have been prosecuted in such Court to recover thereon, if no assignment had been made except in cases of promissory notes negotiable by the law merchant and bills of exchange."

Kings Bridge Co., vs. Ohio Co., 120.

"The distinction, as it respects the application of the 11 Section of the Judiciary Act to a suit, concerning a chose in action is this, when the suit is brought *to enforce the contract*, the assignee is disabled unless it might have been brought in the Court if no assignment had been made; *but if brought for a tortious taking or wrongful detention* of the chattel, *then the* 81
remedy accrues to the person who has the right of property or of possession at the time, the same as in case of a like wrong in respect to any other sort of personal property."

Deshel vs. Dodge, 16 How., 631.

"The assignee of a chose in action may maintain a suit in the Circuit Court to recover possession of the specific thing, or damages for its wrongful caption or detention, though the Court would have no jurisdiction of the suit if brought by assignors."

Bushnell vs. Kennedy, 9 Wall., 391.

82

What is the fundamental character of this suit? To recover possession and control of specific papers—tortiously taken and wrongfully detained—by virtue of an act apparently legal on face of the papers, but totally illegal and without effect.

If "founded on contract," the Court is without jurisdiction. If founded on tort, it has.

The question is purely technical.

(*a.*) There is no essential difference in principle between Deshler's and the present case. 83

In each the assignee sues when the assignor could not.

In each the critical contention is to obtain possession of a specific personal chattel bank-notes in one—bond and mortgage in the other, of which the defendant had possession under an apparent claim of right, viz., an unlawful distress in the one, and an unlawful payment in the other.

In each, the crucial point is whether the act under which the defendant claims is lawful or not. If lawful the possession is lawful, if unlawful, it is tortious.

84

There are slight differences in the facts of the cases. Deshler proceeded by Replevin. The Blacklocks by Bill in equity. Either course is correct. The latter is the most approved. "The same doctrine applies to other instruments and securities, and other evidences of property which are improperly withheld from the persons who have an equitable or legal interest in them, or who have a right to have them preserved. This redress, a Court of common law is for the most part incapable of affording, since the prescribed forms of its remedies rarely enable it to pronounce a judgment in rem in such cases which is or can be made effectual. It is
85 true that an action of detinue or even replevin might in some few cases lie and give the proper remedy if the thing could be found; but generally in actions at law damages only are recoverable, and such a remedy must in many cases be wholly inadequate. This constitutes the true ground for the prompt interposition of Courts of Equity, for the recovery of the specific deeds or other instruments."

2 Story's Eq., (13 Edit.) Sect. 703, &c.

What use the plaintiffs in either case chose to make of the papers—when recovered—has nothing to do with the question of jurisdiction. In one case it was to collect the bank
86 notes, in the other to collect the bond.

(*b.*) But it may be said—the ulterior object—to obtain payment of the bond, determines it to be "founded on contract." It was not so considered in Deshler's case.

It is true if the contract of the bond and mortgage had not been made, this suit could not exist. But it is equally true, if Smalls had not got these papers into his possession by an illegal and tortious act, this suit could not exist.

Small is in possession of the papers. On their face, both on the originals and on the records—the contract is extin-
87 guished—has ceased to be—and he says he is *rightfully* in

possession of them, because his act was legal. They are among his muniments of title.

Dodge said he was rightfully in possession of the bank notes because his distress was legal.

If Small's act was lawful, there is no contract in existence for plaintiffs to sue upon.

If not, he is in tortious possession of them by reason of a tortious act, *and the original basis of this suit is tort.*

It is most natural and appropriate for the plaintiffs to set 88
aside the tort before they attempt to proceed on the contract.

(*c.*) Also that the structure of the bill shows contract to be its foundation.

Prima facie there is no contract remaining.

Small says there is not, that it has been discharged by a given act, and is as if it had never been, and the papers are his.

Who is to determine this? It stands until it is annulled by the Court!

The bill asks that it be annulled—the lien of the mortgage 89
declared existing—and the papers delivered into the custody of the owners. Why not? If the act was illegal the rest follows ex necessitatu.

(*d.*) Also that the bill prays foreclosure, and this shows the true inwardness of the case.

The practice of equity is thus stated by this Court:

"Having obtained rightful jurisdiction of the parties and the subject matter of the action *for one purpose*, the Court will make its jurisdiction effectual for complete relief." 90

Ober vs. Gallagher, 93 U. S., 206.
Taylor vs. Marine Ins. Co., 9 How., 412.
Ward vs. Todd, 103 U. S., 329.
Story's Eq., 64 K.
Quattlebaum vs. Black, 24 So. Ca., 55.

In Ward vs. Todd, "The Court *having once obtained rightful jurisdiction of the parties*, could retain it until complete relief was afforded within the general scope of the subject of the action."

So strong is this purpose in equity, "to do complete jus- 91
tice and save further litigation," that when conflicting claims

arise in a case *even between co-defendants* they will be adjudicated in that suit. Lord Eldon observes in Chanley vs. Dunsany, 2 Sch. & Lef., 718. Further, my Lords, a Court of Equity is bound to do so. The defendant chargeable has a right to insist that he shall not be liable to be made defendant in another suit for the same matter that may be decided between him and his co-defendant, and the co-defendant may insist that he shall not be obliged to institute another suit, for a matter that may be adjudicated between
92 the defendants."

Without this prayer the Court on motion or its own motion would effectuate by decree its own policy.

JURISDICTION QUESTION NO. 2.

If the parties on the record—plaintiffs and defendants respectively—are citizens of *different* States—and thus far the jurisdiction is unobjectionable. *Is it ousted* by the fact that one defendant, who has a *like* but *several* interest with the
93 plaintiffs—is a citizen of the *same* State, *with the defendant* against whom the plaintiffs make their contention.

The plaintiffs have a constitutional right to sue in the Federal Courts.

In all cases where this right is denied—

Either a citizen of the *same* State with defendant has joined in the suit as plaintiff—

Or has made a formal—not a substantial release to the plaintiffs—by such means to juggle into the jurisdiction—

Or otherwise sought to trick themselves into the jurisdic-
94 tion.

Meyer vs. Const. Co., 100 U. S., 457, &c.
Barney vs. Baltimore, 6 Wall., 282.
Williams vs. Nottason, 104 U. S., 210.
Pen. Iron Co. vs. Stone, 121 U. S., 632.
Saving Mer. Co., 18 Wall., 553.

If the principle contended for is admitted, the rights of citizens dependent *on the Constitution* are eliminated: and in its place the volition of one or more persons is substituted in its place as the basis of jurisdictional right.

B. H. RUTLEDGE,
95 JAMES LOWNDES,
Appellant's Attorneys.

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SUPREME COURT U.S.
FILED
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JAMES H. McKENNEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1887.

No. 148.

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vs.

JACOB SMALL AND ALEXANDER ROBERTSON, APPELLEES.

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JAMES SIMONS,
SAMUEL LORD,
For Appellees.

CHARLESTON, S. C.
WALKER, EVANS & COGSWELL CO., PRINTERS,
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93 plaintiffs—is a citizen of the *same* State, *with the defendant* against whom the plaintiffs make their contention.

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STATEMENT.

J. F. Blacklock being the owner of land and mansion house and buildings thereon, in Bull street, Charleston, S. C., conveyed same to defendant, Small, 20th March, 1860, for $16,000.

Paid thus: cash $5,400 00
Bond of Small and mortgage of the
property . . . . . 10,600 00—$16,000 00

Bond payable in three equal annual successive instalments, 2
the first on 20th March, 1861, with annual interest.

Interest was paid to Blacklock by Small in full to 20th March, 1861, on that day, see receipt endorsed on bond. (Trans., p. 67, fols. 187–88, for "July," read "instant," printer's error.) Soon after, by endorsement on bond, Blacklock assigns to Robertson, the uncle of complainants and defendant, Helen R. Blacklock, as follows: "For value received I hereby assign, transfer, and set over all my right, title and interest in this bond to Alexander Robertson, in trust, for the children of J. F. Blacklock."

J. F. BLACKLOCK. 3

Witness: G. W. MOODY.

This was a gift from Blacklock for the benefit of his children. (See testimony of Miss Emma, Trans., p. 56, fols. 158–59.)

Blacklock being a citizen of South Carolina, in May, 1861 (see his testimony, Trans., p. 30, fols. 90–92), went to England, taking his family, complainants and defendant Helen R.,
4 with him, not giving up his citizenship of the State and intending to return (Trans., pp. 30–31, fols. 91–2), and they returned 1866.

Defendant, Small, paid to Alex. Robertson, Trustee, who had the bond and mortgage, October 19, 1861, $3,600 of principal and $147 in full of interest to that date, see receipt on bond. (Trans., p. 67, fol. 188.)

April 4, 1862, Small paid Robertson, Trustee, $2,000 of principal and $490 interest, see receipt on bond (Trans., p. 68, fols. 188–89.)

5 April 10, 1862, Small paid Robertson, Trustee, $5,002.14 in full of principal and interest, see receipt on bond (Trans., p. 68, fols. 188–89), of which only the last instalment, $3,533.33, was not due until March 20th, 1863.

The mortgage was satisfied on record by Robertson, Trustee (Trans., p. 70, fols. 194–96), and bond and mortgage delivered to Small, in whose hands they have been ever since. (Trans., p. 3, fols. 7–8, also p. 15, fols. 46–47.)

The bill in this case was filed 8th October, 1879 (Trans., p. 1, fols. 1–2), and charges that these payments to Robertson were made in Confederate notes. (Trans., p. 3, fols. 8–10).
6 This is denied by Small's answer (Trans., p. 15, fols. 46–47, also p. 16, fols. 48–49.) The payments to Blacklock as well as to Robertson were made by Small in his checks on the State Bank, in which he was a depositor. The checks which Robertson received were deposited by him in the Bank of Charleston. (Trans., p. 40, fols. 116–17; also p. 41, f. 118; also p. 66, fols. 184–85; see testimony of Robertson, Trans., p. 35, fols. 104–05). Up to the time of giving these checks Small had never deposited in the State Bank anything but gold, silver and bank bills, which passed current with coin.
7 The Bank of Charleston continued through the war, saved from ruin and converted into a National Bank, up to the pres-

ent time, in first rate credit. (Testimony of Thayer and Courtney, p. 44–5, f. 128–130.) The stockholders of both the State Bank and the Bank of Charleston were liable for the debts of their respective Banks, as provided by their charters, which were put in evidence (Trans., p. 42, f. 121).

A. A. 1853 (Stat. Vol. 12, p. 217,) being:

AN ACT TO RENEW AND AMEND THE CHARTER OF THE STATE BANK. 8

* * * * * * * *

"IV. That in case of the failure of the said Bank, each stock-"holder, copartnership or body politic, having a share or "shares in such Bank at the time of such failure, or who shall "have been interested therein at any time within twelve "months previous to such failure, shall be liable and held "bound individually for any sum not exceeding twice the "amount of his or their share or shares."

A. A. 1853, p. 245 (Stat. Vol. 12, p. 218,) being: 9

AN ACT TO RENEW THE CHARTER OF THE BANK OF CHARLESTON, SOUTH CAROLINA.

* * * * * * * *

"Third. That in case of the failure of said Bank, each "stockholder, copartnership or body politic having a share or "shares in said Bank, at the time of such failure, or who shall "have been interested therein at any time within twelve months "previous to such failure, shall be liable and held bound indi-"vidually for any sum not exceeding twice the amount of his 10 "or their share or shares."

During the war Charleston was exposed to constant bombardment for several years, and the mortgaged property within range. Shells struck there as well as near by. (Trans. p. 38–9, f. 111–14.)

At the date of Small's payments to Robertson, sterling exchange could have been procured at par or for very little over (Trans. p. 42–43, f. 122–124). Exchange could have been had. (See testimony of Robertson, Trans. p. 36, f. 106.)

The complainant, Emma J., attained full age in 1861 (her 11 testimony, Trans. p. 49–50, f. 142–43); the complainant, Mary,

in 1865 (her testimony Trans. p. 58, f. 163–64); and defendant Helen R., the youngest of the three sisters, 29th August, 1869 (see her answer, Trans., p. 19, fols. 59–60, and p. 20, fols. 61–62).

Emma J. had knowledge of the bond in 1861, and of her
12 interest therein, and of the payments thereof, by Small to her uncle previous to 1866 (see her testimony, Trans., p. 56, fols. 158–59). Mary *had full knowledge* in 1866 (see her testimony, Trans., p. 60, fols. 169–70, also p. 61, fols. 169–70.) Helen R., as well as her sisters, had full knowledge previous to November 17, 1869, when the three filed a bill in the State Court against Robertson and Small, on the very claim set up in this case (see Trans., p. 71, fols. 196–211, the date of the filing omitted from the Transcript by accident, but supplied by agreement of counsel). This case in the State Court was
13 dismissed by order filed March 7, 1871, for failure to give security for costs, the complainants therein having concluded to drop the case. (See Trans., p. 61, fols. 171–72, and answer of Helen R., Trans., p. 19, fols. 59–61.)

J. F. Blacklock, born in South Carolina, was a citizen of that State when the bond and mortgage were executed, continued a citizen thereof up to the filing of the bill in this case and up to the time of the trial. (See his testimony, Trans. p. 47, f. 135–37.) He and his children never gave up their citizenship of this State, and, when absent in Europe, had the *animum revertendi*. (See his testimony, Trans. p. 30, f. 91–
14 92.) The two complainants went to Georgia but a few days before the bill in this case was filed. (See Testimony of Blacklocks, Trans. p. 47, f. 136–137.)

The bill in this case is filed October 8, 1879, and the following is an abstract of the pleadings:

BILL BY EMMA J. AND MARY BLACKLOCK, COMPLAINANTS.

MR. B. H. RUTLEDGE, SOLICITOR. (p. 1, f. 1.)

Bill alleges that they are citizens of the State of Georgia, and are two of the children of J. F. Blacklock, and is against
15 Robertson, alleged to be a citizen of North Carolina, and Helen R., the only other child of J. F. Blacklock, alleged

to be a citizen of South Carolina, and J. Small, likewise alleged to be a citizen of South Carolina, alleges the bond and mortgage and assignment by Blacklock, and that the latter created an executed trust, making the Trustee the holder of a mere dry, legal trust estate, with no other power than to hold bond and mortgage, collect the interest and pay over same to *cestuis que* trust, subject, at any time, to demand from "*complainants*" for conveyance of 16
the same, they being, in equity, absolute owners with their sister, Helen R., of said bond and mortgage.

That, during the war, Small pretended to pay bond as specified, said pretended payment made in Treasury notes of Confederate States, on receipt of which Robertson, Trustee, satisfied mortgage and delivered bond to Small.

That the trust was created for their benefit, and at its creation complainants were infants. That shortly after the assignment to Robertson, Trustee, to wit: on 13th May, 1861, their father, Blacklock, removed with them to, and remained in, England until the close of war, and complainants were entirely ignorant that any attempt had been made to pay bond 17
until their return to South Carolina, when they learned that the bond had been delivered up to Small, by reason of his pretended payments in valueless paper. That the Trustee had never been authorized by them, or any other proper authority, to receive the Treasury notes of the Confederate States in payment of the debt, and that Small had full notice of the trust, by reason of the assignment and his payment to Robertson as Trustee. 18

That Robertson, as Trustee, in accepting the Treasury notes, was guilty of a breach of trust, and is accountable to plaintiffs, more especially as he was not authorized to do so, either by complainants or by any authority of any kind in the trust, and that Small, in attempting to pay his debt in an illegal, unconstitutional and depreciated currency, to a person holding a fiduciary capaeity, he having full notice of the trust, such person being unauthorized to receive the same by law, or by expressed or implied consent, which complainants, being minors, were unable to give and have never given, has 19
failed to liquidate the said debt, and same is still due and un-

paid to complainants, and the satisfaction of the mortgage is inoperative and void; and Small, according to the well established principles of equity jurisprudence, having gotten into his possession the property of complainants, without valuable consideration, with full notice of the trust, is liable to account fully to complainants for the amount due on said bond, with interest.

20

BILL PRAYS:

1. That Robertson, as Trustee, account for the administration of the trust.

2. That the delivery of the Confederate notes, as aforesaid, to the Trustee by Small, pretending to be in satisfaction of said bond, be disallowed, and the satisfaction of said mortgage by said Trustee annulled, and the mortgage re-established
21 and declared a subsisting lien on the land.

3. That complainants have leave to ask for a decree for payment to them, by Small, of the amount proved to be due them, and for a sale of the mortgaged premises, and, meantime, that Small be enjoined from selling or disposing of premises.

ANSWER OF HELEN R. BLACKLOCK.

By Mr. H. E. Young, Solicitor. (Trans., p. 19, f. 58.)

Admits allegations of the bill, and adds that, during the
22 war, she was absent from the United States, was a minor and ignorant of her rights—that she did not reach majority until 29th August, 1869. That she returned to South Carolina, with her father, in 1866, and united with her sisters in efforts to recover their property, which had been taken from them by the illegal acts of their uncle and Trustee, immediately on the discovery of the transactions between himself and Small. That they first sought relief in the State Court, but discontinued the suit, before judgment, on account of the decision in Mayer vs. Mordecai, 1 S. C. Reports, p. 383. That
23 the case of Carson vs. Robertson was then pending, and they awaited its determination.

Alleges that her sister Emma became of age 19th November, 1861, and Mary, 28th December, 1865, and takes the same ground as taken in the bill.

ANSWER OF ALEXANDER ROBERTSON.

By Mr. H. E. Young, Solicitor. (Trans., p. 17, f. 51.)

Admits assignment to him as Trustee, and that there was no other instrument of trust. 24

That Small offered to pay the bond, principal and interest, "*as well as he remembered*," in Confederate currency, or by checks on one of the banks of the city of Charleston, which had suspended specie payments about November, 1860, and had in September, 1861, given notice that all credits would be given and payable only in currency, in which Confederate notes were included; that the payments were made as stated in the bill, the last sometime in April, 1862, many months before the maturity of the bond. That he accepted said currency in liquidation of the bond, and satisfied the mortgage and invested the funds so received in bonds of the Confederate government. That the complainants, who were in England at the time, had no notice from him of what he had done, or of the transactions between him and Small, until after their return to this country in 1866 or 1867. 25

That shortly after their return, complainants called on him to institute proceedings against Small, but he declined, and still considers himself estopped without prejudice to any claim they may have against Small. 26

ANSWER OF JACOB SMALL. (Trans., p. 14, f. 43.)

Admits assignment to Robertson, and that he paid the amounts at the times stated in bill, except that he paid the first year's interest to March, 1861, to Blacklock before he assigned to Robertson. That after that, and when he made the payments to Robertson, Trustee, he had notice of the assignment. He alleges that Blacklock went away from Charleston in 1861 only temporarily, and without any intention of removing his domicil from South Carolina, whither he returned in 1866, and continued a citizen and resident of 27

South Carolina; and that in October, 1879, first on the eve of the filing of the bill in this case, the complainants went to Georgia, leaving their father and sister, Helen R., still residing in Charleston.

He denies that the bond was paid in Confederate notes or
28 valueless paper, and denies any combination. Sets up Stale Claim, and also the Statute of Limitation,

POINTS AND AUTHORITIES.

I. This case is not entitled to the jurisdiction of the U. S. Court.

(*a*) The Judiciary Act of 1789 only conferred jurisdiction on the Circuit Court in cases where "the suit is between a citizen of the State where it is brought, and a citizen of
29 another State." Upon this held:

1. That if a single one of many parties on one side of the suit was a citizen of the same State with one or more of the parties on the other side, the Federal Courts did not have jurisdiction.

Strawbridge vs. Curtis, 3 Cranch, 267.
New Orleans vs. Winter, 1 Wheat., 91.
Coal Co. vs. Blatchford, 11 Wall, 173.

But one exception was made, namely, that merely formal
30 parties would not oust the jurisdiction, even if they were without the required citizenship.

Walden vs. Skinner, 101 U. S., 589.

2. Under the old law, the pleadings only were looked to, and the sole question was whether each of the plaintiffs was a citizen of a different State from each of the defendants.

Coal Co. vs. Blatchford, 11 Wall, 175.

3. Where a joint interest was prosecuted, jurisdiction could not be acquired by omission of some of the parties.

Farni vs. Tesson, 1 Black., 309.

The Circuit jurisdiction is now defined by the Act of
31 March 3, 1875 (18 Stat. 470), of force when this bill was filed, 8th October, 1879.

The language of the Act is as follows:

"The Circuit Court of the United States shall have original "cognizance * * * of all suits * * * in which there "shall be a controversy between citizens of different States."

The removal cases (100 U. S., 468) construe the same words occurring in the second section of the Act regulating removals. The language of that section is: "That any suit 32
"of a civil nature at law or in equity now pending * * *
"in any State Court * * * in which there shall be a
"controversy between citizens of different States." * * *
It was held, "under the new law, the mere form of the plead-
"ings must be put aside, and the parties placed on different
"sides of the matter in dispute according to the facts. This
"having been done, when all those on one side desire a
"removal, it may be had if the necessary citizenship exists."

This has been since settled in Peninsula Iron Co. vs Stone, 121 U. S., 631. 33

Apply this rule to the case before us, and arrange the parties on opposite sides, of real and substantial controversy, and it will be seen that there is but one indivisible controversy between Emma J., Mary and Helen R. Blacklock on the one side, and Small and Robertson on the other, and the bill alleges, that Helen R. Blacklock and Small are both citizens of South Carolina.

b. The Act of 1875 contains this provision:

"Nor shall any Circuit or District Court have cognizance
"of any suit founded on contract in favor of an assignee, unless 34
"a suit might have been prosecuted in such Court to recover
"thereon, if no assignment had been made, except in cases
"of promissory notes negotiable by the law merchant, and
"bills of exchange."

The 11th section of the Act of 1789, contained a similar provision:

"No District or Circuit Court shall have cognizance of any
"suit to recover the contents of any promissory note
"or other chose in action in favor of an assignee, unless a
"suit might have been prosecuted in such Court to recover
"the said contents, if no assignment had been made, except 35
"in cases of foreign bills of exchange."

In Sheldon vs. Sill 8 How: 441--448, held, that the assignee of a bond and mortgage was the holder of a "chose in action," within the meaning of the Act of 1789, and that the assignee coming into a Court of Equity to obtain payment brings "a suit to recover the contents of a chose in
36 action," within the meaning of the 11th section of the Act of 1789, and must shew that his assignor was competent to sue the defendant in the Circuit Court.

There can be no question in this respect under the Act of 1875. A suit to foreclose a mortgage is a "suit founded on contract," and the Court has no jurisdiction unless a bill could have been brought by the original mortgagee.

It has been decided by a series of cases in the U. S. Courts, that where a party claimed in the Federal Court through an assignment of a chose in action, he must allege in his bill or
37 declaration, that the assignor at the time suit was brought was a citizen of a different State from that of defendant.

Bradley vs. Rhine's Admr., 8 Wall, 393 and cases cited.
Morgan's Exrs. vs. Gay, 19 Wall. 81.
Coal Co. vs. Blatchford, 11 Wall, 172.
Corbin vs. Blackhawk County, 105 U. S., 659.

Here the bill is brought by complainants as assignees of J. F. Blacklock, the original obligee and mortgagee. There is no averment of the citizenship of Blacklock, at any time, and the answer of Small and the testimony of Blacklock,
38 show that when the bond and mortgage were executed in 1860, and from then until the filing of the bill and trial below, Blacklock, was, and has always been a citizen of South Carolina.

If the bill be for foreclosure by complainants and Helen R., it inevitably results that there is a want of jurisdiction. If to set aside the satisfaction, and to foreclose through Robertson, trustee, the same result follows. Whatever rights the complainants and Helen R. have, are derived through the assignment from J. F. Blacklock.

39 *c.* The defect in the jurisdiction is therefore apparent on the face of the record. The rule is: Where the citizenship

of the parties or other facts necessary to give the jurisdiction are averred or alleged, in this bill, then the party objecting must raise the question by plea. Where there are no such allegations as in the present case, or where the bill shows on its face the want of jurisdiction, whenever such want of jurisdiction is brought to the attention of the Court, even in the Appellate Tribunal, the suit will be dismissed.

In the case at bar the bill shews on its face the joint interest and the want of jurisdiction on that score. 40

As to the other objections, the bill does not state the citizenship of Blacklock the assignor, and that he could have maintained the suit.

Stanly vs. Bank 4, Dallas 11.
Marshall vs. B. & O. R. R., 16 How., 340-341.
Dred Scott vs. Sandford, 19 How., 393.
Coal Co. vs. Blatchford, 11 Wall., 172.
Bradley vs. Rhines' Adm'r, 8 Wall., 393.
Peninsula Iron Co. vs. Stone, 121 U. S., 631. 41
King Bridge Co. vs. Otoe County, 120 U. S., 225.
Peper vs. Fordyce, 119 U. S., p. 469.
Boers vs. Preston, 111 U. S., p. 252.
Grace vs. Amn. Cont. Ins. Co., 109 U. S., 278.

AS TO THE MERITS OF THE SUIT.

(*a.*) What were the rights and duties of the parties in relation to the bond, after the assignment to Robertson? Had Robertson, as Trustee, the right to receive payment at all, 42
even if paid in gold, each instalment of principal and interest on the very day due? Consider this question in reference to the bond, the mortgage being a mere incident and not effecting the question, for payment of the bond could have been enforced by suit as well as by foreclosure of the mortgage, and bearing in mind that, in South Carolina, a mortgage of realty is not a conveyance of the legal estate, but simply a lien in the nature of a pledge, no reconveyance to mortgagor being necessary. Since the Act of 1791, a mortgage of land in this State does not convey a fee, even after the time for 43
redemption is past. "The legal title still remains in the

" mortgagor, and the land is only considered as a pledge to " secure the payment of the money," 1 McCord Chan. R., 395, and many other cases.

The bill and answer of Helen R. Blacklock contain an assumed conclusion of law, to wit: that the assignment " created " an executed trust, the Trustee of which became the holder
44 " of a mere dry, legal trust estate, with no other power " than to hold 'the same,' collect the interest and pay over " the same to the *cestui que* trusts, and subject to a demand, " at any time, 'from them' for a conveyance of the same to " them, they being, in equity, absolute owners with their sis- " ter Helen." What is meant by an executed trust? The distinction between executed and executory trusts is clearly defined in the text books. Perry on Trusts, Ch. XII., Sec. 359.

But, suppose this an executed trust, it does not follow the
45 Trustee did not have the right to receive payment of the bond. The subject of the trust, in this case, was a bond, a chose in action. The Statute of Uses does not apply. If an executed trust, it was simply a trust completely ascertained in its terms, and in which the " Trustee has nothing to do but carry out the provisions of the instrument," and not one requiring him to convey, or settle, the estate on other trusts, in certain contingencies or otherwise.

The language of the bill is, " a mere dry, legal trust estate." All trust estates are " equitable." What is meant by a " mere
46 dry trust estate," with no other power than to hold the bond and collect the interest, and pay over same to *cestui que* trusts, and subject, at any time, to a demand from them for a conveyance of the bond and mortgage? See definition of a " Trustee of the dry, legal title," &c., Perry on Trusts, Chap. XVII., Secs. 520–521. This is the strongest statement as to " dry trust," and the doctrine would appear to apply to real estate.

As far as Small is concerned, the transaction is not to be measured by the law applicable to trustee and *cestui que* trust, but as between trustee and third persons. These rules are
47 entirely different and distinct, depending on different principles and regulating different relations.

Small made his bond to Blacklock, and, until he disposed of it, Small not only had a right, but was bound to pay to Blacklock.

What was the effect of the assignment to Robertson, "in "trust for the children of J. F. Blacklock?"

There were no other terms to the trust; it was an original transaction. 48

Small had a right to pay, according to the terms of the bond; Blacklock could not have refused the principal or interest, nor could he dispose of the bond in any way to deprive Small of this right. His Assignee was in his place. The custody of the security was entrusted to Robertson, the uncle of Blacklock's children, and to whom assigned for their benefit.

Suppose the doctrine as to a dry trust estate applicable 49
"In such case," to use Mr. Perry's language: "The *cestui* "*que* trust is entitled to the active possession and enjoyment "of the property, and to dispose of it, or to call upon the "Trustee to execute such conveyance of the legal estate as "he directs. In short, the *cestui que* trust has an absolute "control over the beneficial interest, together with the right "to call for the legal title, and the person in whom the legal "title vests is a simple, or dry, trustee."

If the *cestuis que* trust had called for the legal title and got it, say, in this case, by assignment, the Trustee would have had nothing more to do with the subject, and could not have 50
enforced payment. Even if the *cestui que* trust, in the exercise of his absolute control over the beneficial interest, which, in the case of a bond, could only be to collect it and use the money, transfers the beneficial interests to another, that other would stand in his shoes, and the legal estate would continue in the Trustee.

If the *cestuis que* trust did not choose to call for the legal estate, *i. e.*, for a transfer of the bond, it is left with the Trustee, and is subject to his powers as such.

Minority of the *cestuis que* trust would not affect the principle, because they could have been represented by a guardian. Emma J. was of age before Small's first payment to 51
Robertson.

The effect of the assignment was to bind Small to pay the bond to Robertson, subject to the right of his nieces, at any time they saw fit before payment to Robertson, to call for a transfer to them directly. Could it be imagined that until this was done, Robertson could not have compelled Small to
52 pay to him according to the tenor of the bond?

It was Blacklock's property he saw fit to entrust to Robertson.

Even if, by the assignment to Robertson in trust, Blacklock had, as it were, constituted Robertson guardian of his children as far as the bond was concerned, a guardian is a trustee who may prosecute a suit on behalf of his ward for his choses in action. When, therefore, as to such choses the guardian is barred by the statute of limitation, in the absence
53 of collusion the infant is barred also as against strangers, and must resort to his remedy against the guardian.

Long vs. Cason, 4 Rich, Eq., 66.

The bill alleges that Robertson had authority to receive the interest only. What possible difference can there be between the one and the other under the assignment as far as Small is concerned? One is as much a part of the debt as the other, and if Robertson had the right to receive the interest as alleged, he had the same right to receive the principal.

But is there anything in the definition as to a dry trust to militate against the right of Robertson to receive payment
54 from Small? Surely he had the right to sue him on the bond, and if so, to receive payment.

Note what Mr. Perry says, Section 330: "The Trustee "is entitled to the possession of all personal securities, " * * * * and he may maintain an action for their "delivery even against the *cestui que* trust. All personal "actions for injury to the personal property, or for its deten- "tion or conversion, such as trespass, trover, detinue or "replevin, must be brought in the name of the Trustee, " * * * * * * * * * * The action of *assumpsit*
55 "is an equitable action, and generally, if a promise is made "to one for the benefit of another, the person for whose

"benefit the promise is made may bring the action; but if a
"promise is made to a Trustee for the benefit of the *cestui*
"*qui* trust, the Trustee alone can sue. So only those parties
"can sue on a contract with whom it is made, unless it is a
"negotiable paper. * * * * * If the *cestui que* trust
"brings an action in the name of the Trustee, the Trustee may 56
"insist on indemnity for costs. If the Trustee collusively
"releases such suit without the consent of the party benefi-
"cially interested, the Court will set aside the release. So if
a Trustee discharges a debt or mortgage without payment,
"the Court would set aside the discharge." * * * * *
"Sec. 331. The Trustee * * * * * * should of
"course have possession and control of all personal property.
"So all the duties and privileges which attach to such prop-
"erty pertain to him. If the property consists of stock in
"corporations, he may attend corporate meetings, vote and 57
"hold office by virtue of such stock."

Sec. 521 of Perry on Trusts does not apply, for Robertson was not managing or disposing of the estate as far as Small was concerned. He was not converting real into personal estate, or *vice versa*.

It would seem clear from this that, until his connection with the trust was ended by the *cestuis que* trust having the bond transferred to them, he not only had the right, but it was his duty, to collect the bond. If he had the right to sue, he had the right to receive payment.

Even since the adoption of the Code of Proceedure in South Carolina, §134 provides "an executor or administrator 58
"a Trustee of an express trust, or a person authorized by
"Statute may sue, without joining with him the person for
"whose benefit the action is prosecuted. A Trustee of an ex-
"press trust, within the meaning of this section, shall be con-
"strued to include a person with whom, or in whose name, a
"contract is made for the benefit of another." Gen. Stat. 1882, Sec. Code of Pro.; Div., § 134.

Even where a note should contain a promise by the maker to pay A, for the use or benefit of B, a certain sum of money, A, and not B, would be the proper person to maintain an 59

action on the note. So, also, with all other contracts made in the same way. Story on Agency, Sec. 394.

There is no doubt, therefore, that Robertson had the right to maintain an action on this bond, whenever there was anything due on it, and, therefore, could receive payment without suit, and give a good discharge. Of course, if the discharge was given collusively, or the bond satisfied without
60 payment, it would have been a fraud. As to this, we will speak later.

(*b.*) If Robertson had the right to receive payment from Small in gold, as, and when, the principal and interest came due, did he have the right to receive payment of the bond, or any instalment, before it became due, if paid in gold?

It would seem that, as soon as it established that he had the right to sue, he had the right to receive payment at any time he saw fit, being responsible for his action, but with
61 power to discharge the obligor; provided, there was no fraud or collusion in the payment.

Suppose a note made to pay A, for the use of B, at one, five, ten, thirty or sixty days, or a bond at a year. We have already seen that A must sue. Who would doubt that A could receive payment, at any time? But the case of a Trustee, like Robertson, is much stronger.

Lewin [520]: "A Trustee, under circumstances, may release "or compound a debt." But, if a Trustee release or compound, without some sufficient ground in justification of his conduct, he will clearly be answerable to the *cestui que* trust for the
62 amount of the *devastavit*. It is nowhere hinted, in a case clear from fraud and collusion, that the discharge of the debt would be void.

Hill on Trustees, [449].

Hill on Trustees, [381]: "However, it is not the duty "of the Trustee to call in money invested on good security, "where there is no risk apparent; although it is otherwise "where, from change of circumstances, the security of the in- "vestment is diminished and the capital endangered, as where "the interest is not regularly paid and becomes greatly in
63 "arrear. It is difficult to lay down any definite rule for the "guidance of Trustees in such cases, in each of which they

"must necessarily be governed by their own discretion adapted "to the particular circumstances, bearing in mind the general "rule that, in all cases, a Trustee is bound to take the same "precautions and act with the same prudence with regard to "the trust estate as if he were dealing with his own."

Mr. Perry, in section 438, lays down the principles to be observed by Trustees, and, among other things, says: "If 64
"any loss happens to the estate, from any delay, they would "be responsible, and they may accept payment, even before "the debts are due."

It would seem, therefore, that the Trustee, having the right to receive payment when due, would have had the right to receive payment, in gold, before due, provided the reasons for so doing were sufficient to justify his action. If not, he would be liable, personally. The debtor, however, would be discharged, unless there was fraud or collusion. This is only reasonable. And hence the law regulating the relations between 65
Trustee and *cestui que* trust is different from that regulating those between Trustee, or *cestui que* trust, and third persons. And it is but right that it should be so. This principle should stand in the way of these ladies throwing the loss, which they say they have experienced from the unauthorized and illegal acts of their uncle, upon Small, whose money he received.

The Trustee is selected by the parties for their own purposes, and the appointment involves confidence in him, and the law does not make the third person a Trustee, except 66
where he purchases trust property, with notice of the trust, and, cosequently, only takes what the Trustee has to convey. But this principle cannot be extended to the case of payment to a Trustee. Although fraud and collusion may be charged, and if substantiated will avoid the transaction, but on a different principle.

(*c.*) We suppose if it were not for the allegation in the bill that the payments were made in Confederate notes or valueless paper, this suit would not have been instituted. In other words, complainants would hardly have alleged in their bill that Small paid up his bond at the times and in the amounts 67
stated in gold, and then ask the relief they seek on the ground

that their uncle had no right to receive gold. But the allegation in the bill is denied in the answer, and it is incumbent on complainants to prove it.

As to the payment of the interest and first instalment, paid October 19th, 1861, the amount of principal matured and interest due that day was thirty-five hundred and thirty-three
68 dollars thirty-three cents; and thirty-six hundred dollars was paid possibly to make an even amount; at any rate, the difference was only sixty-six dollars sixty-seven cents. Small, by the terms of his contract, had a right to pay; Robertson, a right to receive. It is said the payment was make in Confederate money, depreciated currency, valueless paper. Which allegation is denied by the answer. It is proved beyond doubt by Small, Robertson and the check book and bank book of Small that this payment was made in the check of
69 Small on the State Bank. It is further established by the testimony of Small that he had never deposited a dollar of Confederate money, and his deposit book shows no entry of currency until April 29th, 1862, after he had paid the bond in full, or of Confederate treasury notes until February 17, 1863. (See Trans. p. 66, fol. 184–85.)

Mr. Thayer, formerly Cashier of the Bank of Charleston, a witness produced by complainants, when examined by complainant's solicitor, says: (See Trans. p. 27, f. 82, *et seq.*)

Q. At what time did Confederate money begin to be generally current and to displace other currency?

70 A. The first issue, I think, was during the Summer of 1861; the green notes, I think they called them, 230, about December, 1861, a considerable amount of currency had reached here, as I know from facts. In June, 1862, the Bank was ordered from Charleston; I was sent with it, and we had very little of anything else but Confederate money for circulation.

Q. What I want to get at is, that between December, 1861, and June 1862, you said, as I understood you, that Confederate money began to be generally current?

A. I did not say that.

71 Q. Between December, 1861, and June, 1862, in the course of that time did it generally displace other currency?

A. It did.

Q. Can you tell me whether there was and at what time a meeting of the representatives of the Banks in Charleston, in which they determined that they would only make collections in currency?

A. Yes; I think it was in September.

Q. Were Confederate notes included in that?

A. Yes; I think so? 72

Q. Can you say whether or not after December, 1861, all business transactions were understood as being made with reference to Confederate notes?

A. That and bank bills. They ran parallel in the banks.

In the cross-examination. (Tr. p. 28, f. 85):

Q. Can you fix the precise time when the volume of Confederate notes which had been issued was sufficient to affect sensibly the currency received on deposit in the banks?

A. From about June, 1862. 73

Direct examination resumed. (Tr. p. 28, f. 86–87–88):

Q. You have testified, as I understood you, the circulation of Confederate currency, that in June, 1862, it had become nearly altogether in Confederate government notes?

A. Yes, sir.

Q. Was not the displacement going on gradually between December 1861, and June, 1862?

A. Because the Confederate money and the bank bills were commonly current with gold or silver. But you would have 74 to pay something for either gold or silver about June, 1862. I don't think there was any distinction made. I merely mention that prior to December, 1861, the banks had sent a large proportion of their bills in.

Q. People were generally receiving that currency for debts whether original or not?

A. Oh, yes, sir.

Q. What time?

A. 1861. Yes, there was no distinction that I know of. The only thing was if you wanted gold or silver in large quantities you had to pay a slight premium for it. 75

By Gen. Rutledge. (Tr. p. 29, folio 88.)

Q. In October, 1861, were either bank bills or Confederate currency at par with gold or silver in the open market?

A. I don't think that the difference, if any, was of any consequence. I don't think it has affected it materially.

Q. But it had some?

A. I cannot say.

Q. In April, 1862?

76 A. I think it had affected it.

It is evident from this testimony, that Confederate currency did not begin until December 1861, and this payment was October 19th, 1861. It appears from the testimony, that at that time, if Mr. Robertson had demanded, or required gold, it would not have been difficult for Small to have complied. It was the habit to pay debts in bank bills, as they were the currency of the business world, and it was the habit to receive payment in checks for convenience. It was for Mr. Robert-

77 son to require something else. Small, having undoubtedly, the right to pay, and Robertson the right to receive, the usual payment by check, on a bank in which he had deposited nothing but gold and silver and bank bills, received by Robertson, would beyond doubt, be a good payment. Confederate notes had not then become the currency of the country. The only currency was bank bills and gold and silver. Mr. Thayer says it was between December 1861, and June 1862, that Confederate notes began to become a part of the circulation. Robertson himself says that Confederate

78 currency came in winter of 1861, November 1861. (Trans, p. 36, fol. 105.)

As far then, as this first payment is concerned, this case is distinguishable from Ward vs. Smith, 7 Wallace, 447. The creditor resided in one part of the country and the debtor in another, war raging betwen the two sections. Smith had three bonds, payable at the bank in Alexandria. He had only left one bond at the bank. It was proved that the bank notes deposited by Ward were at a discount at the times they were deposited. Were at a discount ranging from 11 to 23. In that case Smith did not receive the bank

79 notes himself, they were deposited to his credit by Ward, and he never assented to their receipt. In this case the per-

son to whom the debt was payable, who had the right to compel payment by suit, when this interest and instalment was payable, received the payment when the notes were used by the whole business community in their transactions. At a time too when plaintiffs own witness, Mr. Thayer, says: " there was scarcely any distinction that I know of; the only " thing was, if you wanted gold and silver in large quantities, 80
" you had to pay a slight premium for it," at a time too when as Mr. Bollman says, that exchange could have been bought, and he bought it at $5 to the pound. It is also distinguishable from Fretz vs. Stover, 22 Wallace, 198. In that case, the bond was made to Fretz and wife,—the trust deed to Chilton. Chilton was in Virginia in the Confederate lines. Fretz, a citizen of Pennsylvania, and there residing. Mr. Blacklock and his daughters, citizens of South Carolina, and also Robertson and Small. Blacklock and his daughters went temporarily to England, which was at peace with both sec- 81
tions. Fretz could not be communicated with, and Mr. Robertson says himself he could get exchange from the Bank of Charleston, where he deposited the checks received from Small. In Fretz vs. Stover, the Court say, p. 204, " this " compromise was effected in February, 1861, and contem- " plated several transactions which could not be completed " until after Fretz returned to Pennsylvania. Among these, " was the execution of the bond and deed of trust in question. " As Fretz could not in person see that the papers were " properly drawn, he intrusted that duty to Chilton, and the " additional duty of having the deed recorded. It was un- 82
" doubtedly expected at the time, that before the bond ma- " tured, Fretz would hold frequent communication with Chil- " ton, and this may account for nothing being said on the sub- " ject of collecting the bond. There was no necessity for it, " as the bond had a long time to run, and besides no trouble " was anticipated about the collection of it. It is, however, " fairly to be inferred from the relation between the parties " that Chilton had authority to collect, and transmit in the " absence of any specific directions on the subject, and if war " had not intervened, *and he had not been told to collect the* 83
" *bond in legal currency alone, he would have been author-*

"*ized to receive payment in current bank bills, which passed*
"*at their par value in business transactions*, at the place
"*where the contract was to be performed.* But if this rule
"holds good when the country is at peace and undisturbed
"by civil commotion, it has no application in a state of war,
"like that of the rebellion *That rebellion effected a change*
"*in the status of the parties to this contract, and in the re-*
84 "*lation between the appellants and Chilton. Although the*
"*country was unquiet, when these parties, in February, 1861,*
"*settled their differences, yet it would be a violent presumption*
"*to suppose that they anticipated the changed condition of*
"*things which soon after occurred. They doubtless acted on*
"*the belief that the difficulties which threatened the peace of*
"*society would be adjusted, and the monetary affairs of the*
"*country remain as they were.*" In this case, the bill alleges
that Blacklock left 13th May, 1861, after the war had actually
commenced, and he made the assignment to Robertson as
Trustee, knowing that he was to keep the bond and repre-
85 sent him in the place where the war was to rage. He was the
uncle of his daughters, for whose benefit he had entrusted
the bond to him; he had already received the first year's in-
terest from Small, in March, 1861, after secession, and when
the bills of banks which had suspended specie payments was
the circulating medium. His receipt was on the bond when
he gave it to Robertson. He received this payment in a
check on the State Bank, precisely as Robertson received the
other payment. If Robertson was not to receive payment of
the bond, why was it left with him by Blacklock? Why was
86 the bond not carried with the *cestuis que* trust to England, if
this was not the case? But it is contended that all the banks
in Charleston had suspended specie payments in 1860. In
1861, March, Mr. Blacklock, who had not yet assigned
the bond, received the first year's interest himself from Small,
in the same manner that Robertson received the payment in
October, 1861, and according to the testimony of Mr.
Thayer and the other witnesses examined by the plaintiff,
there was no difference in the bank bills in March, 1861, and
87 October, 1861.

The plaintiff put in evidence Act to provide against the

suspension of specie payment by the banks of this State. (Act of Assembly, 1840, Vol. 11, p. 111.) This Act provides a penalty for banks suspending specie payments. By the Act, 13th November, 1860 (Vol. 12, 735), likewise put in evidence by plaintiff, this penalty was suspended until 1st January, 1862. By the Act of 21st December, 1860, (Vol. 13, 36), the penalty was suspended to 1st January, 88
1863. The plaintiffs likewise put in evidence the scaling Act, but this has no application, as this payment was not made in Confederate currency. Even if the Legislature postponed the operation of the penalty against the banks for suspending specie payments, even if the banks did suspend specie payments, according to the testimony of Mr. Thayer, a bank officer, and entirely conversant with such matters at the time this payment was made and received, bank notes and gold passed indifferently as currency, and it was only if gold was wanted in large quantitities that it called for a slight pre- 89
mium. Mr. Bollmann shows that, after this transaction, even he purchased exchange at $5 to the pound, and that at this time it could readily have been procured. There was Robertson, the uncle of these ladies, and to whom Blacklock had entrusted this bond, at the time the first instalment and principal and the interest was payable, receiving it in the same funds Blacklock had received the first year's interest. (Trans., p. 40, fol. 117, and p. 66, f. 184.) When he could have readily got the money in gold, if he had only desired to have it so paid, and simply because he did not take the care of the money 90
after he got it, that his nieces thought he should have done, they wish to visit this on Small. Why was his money taken? Why was it not refused? He could have used it; it was then worth, practically, as much as gold, according to the testimony of plaintiff's witness, Mr. Thayer. If the loss has taken place by the act of Mr. Robertson, the uncle of the young ladies, and to whom their father saw fit to entrust his property for their benefit, it would surely not be right to make Small pay his debt twice. The payment of the first instalment and interest was made October 11th, 1861. The pay-
ment of the second instalment and interest was to be made 91
April 2d, 1862.

As to the payments made April 4th and 10th, 1862:

The second instalment of principal, viz: $3,533 33, with the interest on the principal then owing, was due on 20th March, 1862.

He then paid, April 4th, 1862, $2,490 00.

On 10th April, 1862, he paid the balance of what was then past due, and paid the last instalment which would not have
92 been due until March 20th, 1863.

The fact as established shows that Robertson was not only willing, but anxious, to receive payment of the bond, stating that it came just at the right time. (See testimony of Small, and not contradicted. Trans. p. 96, f. 115) Small knew that Mr. Blacklock had gone with his daughters to Engand, and that many people were sending money out of the country to have it safe, and might well have supposed that Mr. Robertson desired to have the money of his nieces sent abroad out of jeopardy to the country where they were, and where it could be safely invested for them, and where they could have it in
93 case of necessity. He could scarcely suppose that he would be desirous of committing a breach of trust as to his own nieces—Mr. Robertson at that time being a man in high business and social position.

These payments were made by checks, given by Small on his bank of deposit, in which, as to the time of giving the checks, he had deposited nothing but gold and silver and bank notes, constituting the circulation of the country, and which checks were deposited by Robertson in the Bank of Charleston, which never suspended business, but which con-
94 tinued, and, with its capital saved throughout all the vicissitudes of the war, was converted into a National Bank and is in first-rate credit. As we said, in speaking of the payment of October, 1861, this case is distinguishable from Ward vs. Smith and Fretz vs. Stover, for the reasons already stated. It must be remembered, too, that the testimony of Mr. Thayer, in relation to the value of bank bills, was as the period from December, 1861, to June, 1862; but it is said the payment of the last instalment was in anticipation of the times
95 for payment limited in the bond. Mr. Perry, in section 476, says:

"(*t.*) But there are circumstances where a Trustee must
"exercise the discretionary powers of an absolute owner,
"otherwise, great loss might happen to an estate; the exe-
"gencies of the moment may demand immediate action; the
"*cestuis que* trust may be numerous and scattered, or under
"disability, or not in existence, so that their sanction cannot
"be obtained without great inconvenience. The alternative 96
"of applying to the Court may be attended with considerable
"or disproportioned expense and, perhaps, delay, so that the
"opportunity is gone and lost forever. It is, therefore, evident
"that it is for the interest of the *cestuis que* trust, that the
"Trustee should have reasonable discretionary power, to be
"exercised in emergencies, though no such power is given in
"the instrument of trust." Again, section 440, middle of
the section: "If an outstanding debt is secured by a real
"mortgage, it ought not to be called in, if it is safe, until it
"is wanted in the course of administration, but pains should 97
"be taken to ascertain if the security is safe. If the mort-
"gage security is not adequate, the Executor or Trustee must
"insist on payment, even where the *cestui que* trust is to
"consent to every change of investment, and refuses to con-
"sent, for nothing will justify conduct that endangers the
"fund." See observation of Supreme Court in Glasgow vs.
Lipse, 117 U. S., at pages 333–334, ending thus: "He may,
"however, take payment of a debt when not secured, in the
"best money he can get, when its safety requires its collec-
"tion. Under these limitations, he must do what under the 98
"circumstances and situation prudent men managing their
"own estates would do."

This distinctly shows the powers of the Trustee to receive payment, whenever they see fit, and we contend that this case is different from Ward vs. Smith and Fretz vs. Stover, on account of the different relations existing between the parties and the difference in their relative situations.

Mr. Blacklock, seeing the war inevitable, already commenced, with the indications that the struggle would be long and protracted; that Charleston, in all probability, would be the scene of some of the most trying struggles, determined 99 to go with his family to England, not intending to give up

his citizenship or to remove his domicile from South Carolina, and turned over this bond and mortgage to Robertson. Now, what was the security on this bond? Small, and the mortgaged property, both exposed to ruin by the chances of war. No possible chance of covering the property by insurance against the risk of bombardment; exposed to
100 destruction hourly, and to contingencies which might sweep it away at any moment. Talk about receiving legal-tender money, gold, bank notes of banks that were at par with gold. The question with Robertson was whether he should take any kind of money, rather than take the risk of his security. It is clear the money could have been more easily taken care of. Real estate in Charleston was in the greatest jeopardy. It is a matter of public history that the great fire in December, 1861, had swept down one-third of the city, and its path through the city is marked to-day with ruins which have
101 never been rebuilt, and lots which have never since been improved. Robertson tells us that, when he received payment of the bond, Blacklock and his family were in England; that exchange could be had at the Bank of Charleston. We know, from the testimony of Bollmann, that wise persons were sending money across the water. It is a matter of history, and Robertson tells us, in his testimony, that many persons, fearing the destruction of their property in the bombardment and the struggle in and about Charleston, sold real estate for Confederate money and preferred to invest it in other things. Robertson knew well where the property was
102 located, and that that residence and buildings constituted the principal value. It was in the part of the city within range of the shells—some of which struck in and around it. Now, was not this a proper occasion for Robertson to exercise his discretion, and, if there was no collusion and fraud between him and Small, there is no doubt of his power to exercise it; and that, although his nieces may hold him for his failure to take proper care of the fund, they should not be allowed to make Small answerable for his mistake. If he had left the money received from Small in the Bank of Charleston, where
103 he said he deposited it, and not invested in Confederate bonds, it would not have been lost. Moreover, Small knew that

Blacklock and his family had gone to Europe, and could well imagine that Robertson, when he said the money came in the right time, intended to send it abroad, which he said he could have done.

Besides this, in addition to the risk of the security, he very well knew that the charters of the banks, both State and Bank of Charleston, made the stockholders liable, and he 104
thus got a better security, in the uncertain condition of things then in Charleston.

See charter Bank of Charleston, A. A. 1853, p. 245; see charter Bank of State, A. A. 1853, p. 243. *Supra in statement.* We contend, therefore, that this was clearly a case under the circumstances where the Trustee, Robertson, had the power to act and to receive payment as he did from Small. And that in so doing Small was discharged, although Robertson was answerable to justify his action, and for taking the necessary steps for protecting the fund. 105

It must be remembered that Small never made any of the payments in Confederate money, but in his check on the State Bank, where he had never deposited any Confederate money up to the time of giving these checks. Small's "check called for dollars, and when it was received on "deposit" by the Bank of Charleston, deposited by Robertson, "it was a matter between him and the Bank whether he "would receive Confederate notes for the amount. Had he "been unwilling to receive them, and the Bank had refused to "give any other money, he should have notified the drawer "and by returning the check, asked to be restored to his orig- 106
"inal position." * * Small was informed when he gave the check "that it came just in the right time."

Glasgow vs. Lipse, 117 U. S., p. 335.
Donnelly vs. Dist. Col., 119 U. S., 339.
See as to payments in bank bills when current, Legal Tender Cases, p. 445, 110 U. S.

Of course if Small colluded with him in perpetrating a fraud on the *cestuis que* trust it would be a different matter, and of this we will speak hereafter. 107

3. STALE CLAIM.—One of defenses of Small is that the claim

made by this bill is a stale claim, and that on this ground complainants under no circumstances are entitled to recover. Now their claim is based on the ground, either that Robertson misused his power to receive payment and received payment in a manner that he should not, or that it was a fraud on the part of Small, either on his part alone or in collusion
108 with Robertson. We will first consider the case in the aspect that Robertson misused his power to receive payment and received payment in a manner that he should not, and that as Small had notice of his trusteeship, the transaction cannot stand. This, after all, is a fraud. It does seem that the only foundation for a claim against Small would be on the ground of fraud in him; but on whatever theory the claim set up in in the bill be based, we contend that it was a stale claim, even in a case of agency. Ward vs. Smith, the Supreme Court says,
109 p. 452: "That the power of a collecting agent by the general "law is limited to receiving for the debt of his principal that "which the law declares to be legal tender, or which is by "common consent considered and treated as money and passes "as such at par, is established by all the authorities. The "only condition they impose upon the principal, if any "thing else is received by his agent, is that he shall "inform the debtor that he refuses to sanction the unauthor-"ized transaction within a reasonable period after it is brought "to his knowledge;" but a case of agency is much stronger against the debtor, than one like the present, where
110 the person receiving the payment had the right to sue and to receive payment. His action is conclusive unless it can be set aside for fraud. The case of Ward vs. Smith was entirely different, as we have shown. In Ward vs. Smith, as we have said before, one party was in the North and the other in the South. The two sections at war. Smith, who was the payee of the bond, did not assent to the payment. There was not even an agent to assent for him, for war suspended the agency.

In Fretz vs. Stover, the bond was made payable to Fretz and wife. The trust deed to secure it to Chilton, and
111 the bond was left with Chilton. The deed of trust was ancillary to the bond, which was the principal, and this

was payable to Fretz and wife, and Chilton under no circumstances could have received payment except as agent. If agent, the war suspended the agency; if agent generally, he having overstepped any authority he might have had, expressed or implied, his act is void. In the case in 112
hand the bond was payable to Robertson, and he was the only one who could maintain suit on it, either in his own name as Trustee, or in the name of Blacklock to his use as Trustee. We expect to show that there is no claim at all against Small, except it can be founded on fraud, as we have shown, their claim must be, as far as Small is concerned, by reason of some matter outside the contract. Now we contend that such is a stale claim. The best definition of a stale claim and the rule of Courts of Equity in relation 113
thereto, is that given by Lord Camden, in Smith vs. Clay, 3 Brown's Chancery cases, and quoted by Judge Story, in delivering the opinion of the United States Supreme Court, in Pratt vs. Vattier, 9 Peters, 415, 416. "A Court of Equity," said he, "which is never active in relief against conscience or "public convenience, has always refused its aid to state de- "mands where the party has slept upon his rights or ac- "quiesced a great length of time. Nothing can call forth this "Court into activity but conscience, good faith and reasonable "dilligence; when these are wanting, the Court is passive 114
"and does nothing. Laches and neglect are always dis- "countenanced, and therefore from the beginning of this juris- "diction, there was always a limitation of suits in this Court." "This doctrine continues" Judge Story, "has been repeatedly recognized in the British Courts, as will abundantly appear from the cases already cited, as well as from the great case of Cholmondely vs. Clinton, 2 Jacob & Walker, 11. It has also received the sanction of the American Courts and was largely discussed in the cases which he mentions. In this case Judge Story also says, "but "in truth the answers, though they rely generally on "the lapse of time, do not specially rely on the Statute "of Limitations as a bar, and the case may therefore, "well be decided upon the mere lapse of time, independently 115
"of the Statute." In Badger vs. Badger, 2 Wallace, the Court,

at page 93, say: "The whole transaction was public and well known to the widow and the heirs, and their guardian. The purchase of the estate by the administrator could have been avoided at once, if any party interested disapproved of it." Page 94: "Now, the principles upon which Courts of Equity act in such cases are established by cases and authorities too numerous to mention, etc." Maxwell vs. Kennedy, 8
116 Howard, 210. Bowman vs. Wathen, 1 Howard, 189. Sullivan vs. Portland R. R. Co., 94 U. S., see page 811. The Court is always unwilling to lend an ear to a stale claim. Hall vs. Law, 102 U. S., p. 467. Burke vs. Smith, 16 Wallace, 401. Godden vs. Kinnell, 99 U. S., 201, 210, 212. Hunt vs. Smith, 3 Rich. Equity, 465. Hume vs. Beales, 17 Wallace, 336. Hoyt vs. Sprague, 103 U. S., 636, and many other cases. In the present case the bond was paid to Alexander Robertson, Trustee, the uncle of complainants and defendants,
117 Helen R. Blacklock, and who was the only person to sue on it, and who had the right to receive payment. The eldest of the Misses Blacklock was of age in 1861, and the youngest in 1869. After they were all of age they began a suit in the State Court in 1869 against Small, which they voluntarily had dismissed. After having full notice thus of the transaction they supinely rested on their rights, whatever they may have been, until 8th October, 1879, when by the present suit they attempt to undo a transaction completed seventeen years and more before the commencement of this suit. We
118 contend, therefore, that this is a stale claim, and that a Court of Equity will not lend its ear to it. But it is alleged in the bill "that the defendant, Small, according to the well established principles of Equity jurisprudence, having gotten into possession the property of complainants, without valuable consideration, with full notice of the trust, is liable to account fully to complainants for the amount due on the bond, etc." We have shown this not to be the fact, but if it was, what sort of a Trustee did Small become? Certainly not an express Trustee, but an implied or constructive Trustee. All that has been said about stale claim will apply to any demand
119 against him, based on the idea of his being a constructive Trustee. But more than that, the Statute of Limitation bars

any such claim. The Federal Courts adopt the decision of the State Court in construing State Statutes as the law of such cases, and where these Courts have varied this Court accepts the latest decision of the highest Court of the State as a sound one. Leffingwell vs. Warren, 2 Black, 599. Four years bar claim against an implied or constructive Trustee. Joyce vs. 120
Gunnels, 2 Rich. Eq., 258. The same thing was held by the United States Supreme Court in Beaubien vs. Beaubien, 22 Howard, 190. Spidell vs. Henrici, 120 U. S., 377.

In Hunt vs. Smith, 3 Rich. Eq., (So. Ca.), the Court say, p. 465 :

" * * If they will not bring their claims to the judicial " cognizance of Courts until some of the witnesses are dead, " and the memory of the surviving have become dim and " faded, it is clear that they have no right to embarrass those " who administer justice with their stale, obscure and anti- " quated claims. In the adjudication of such claims, every 121
" step that is taken is one of doubt, and there can be no " assurance that any judgment that is rendered may not be " founded in error, and be fraught with injustice. The Court " is not obliged to descend into the catacombs and charnel " houses and amidst the bones of the forgotten dead, and by " the dim phosphorescent light which they emit, to adjudge " matters of right appertaining to this living and breathing " world."

And as the United States Supreme Court say in Hoyt vs. Sprague, 103 U. S., p. 637 : 122

" Without further discussion it suffices to say, that the " complainants came into Court too late to obtain relief, even " if, when they came of age, they could have justly com- " plained of the conversion of their property into the stock " of the corporation. In such cases it is not merely a ques- " tion as to what information respecting their rights parties do " actually obtain, but as to what information they might have " obtained had they used the means and opportunities directly " at their command. Others acting in good faith also have " rights ; the world must move ; and it is to the interest of 123
" the community that controversies should have an end."

The justice of the doctrine of stale claim is set forth in

many cases decided by the Supreme Court of the United States. It is founded on the highest principle of right. The Courts will not permit people to rest supinely upon their supposed claims, in order to speculate upon the decisions of Courts in other cases, or for any other reason, misleading
124 those against whom they would make their supposed claims into false security. As was well said by Lord Mansfield in the case of Admiral Dacres:

"* * * I think it would be most contrary to *equum* and "*bonum*, if he were obliged to pay it back. For, see how it "is! If the sum be large, it probably alters the habits of his "life, he increases his expenses, he has spent it over and over "again; perhaps he cannot repay it all, or not without great "distress; is he, then, five years and eleven months after, to "be called on to repay it?"

125 FRAUD: STATUTE OF LIMITATIONS.

3. We contend that the claim of these complainants is against their uncle, Mr. Robertson, their Trustee.

That the only claim they can have against Small, would be in case they could make out that he had committed a fraud in the payment of his bond. Of this there is no evidence whatever, unless the mere fact that he paid the bond to the Trustee in his checks on the State Bank, and which were accepted by Robertson, in itself constitutes a fraud.

126 We must bear in mind the distinction, already pointed out, between this and the cases of Ward vs. Smith and Fretz vs. Stover, and in which we are borne out by the case of McBurney vs. Carson, 99 U. S. It must be remembered that, in that case, the bonds were payable to Robertson and Blacklock, Executors. Robertson received the payment complained of. In this case, the bond was payable to Robertson. In McBurney vs. Carson, p. 570, the Court say: "The bill charges fraud, conspiracy and spoliation. If the charges are untrue, the bill should be dismissed." And, on p. 571: "There was evidently a plot. McBurney & Co. were its con-
127 trivers; Ball was their instrument; Robertson was their dupe, and the Carsons were the victims."

We scarcely think that any one who knows the parties would think that Small, who was a German baker, was likely to make Mr. Robertson, who, for years, was the head of one of the largest mercantile concerns in the country, a dupe. A man experienced in business, and acting, as he considered, 128
for the interest of his own blood.

But, if by any means the transaction could be classed as a fraud, then, (if the Court is correct in McBurney vs. Carson) if the charge is untrue, the bill should be dismissed; and, if barred by the Statute of Limitations, the same result must follow.

Relief for fraud barred after four years after its discovery. This previous to the Code which was adopted 1st March, 1870. See

Van Rhyn vs. Vincent, 1 McCord's Ch., 310.
Prescott vs. Hubbell, 1 Hill Equity, 212. 129
Eigleberger vs. Kibbler, 1 Hill Equity, 113.
Farr vs. Farr, 1 Hill Equity, 387.
Turnbull vs. Gadsden, 2 Strobb, 14.
Beck vs. Searson, 8 Rich. Equity, 130.
Lott vs. Degraffenried, 10 Rich. Equity, 350.
Kibler vs. McIlwain, 16 S. C., 555.
And other cases.

Since the Code adopted 1st March, 1870, action for relief on account of fraud barred in six years from discovery. § 114, sub. 6., Gen. Stat. 1882, Code Div. 130

"SEC. 112. within six years. * * * * *

"6. Any action for relief on the ground of fraud, in cases "which, heretofore, were solely cognizable by the Court of "Chancery, the cause of action in such case, not to be "deemed to have occurred until the discovery by the ag- "grieved party of the party constituting the fraud."

Under the decisions of the S. C. Court, the Stat. of Limitation provided by the Code, only applicable to cases arising since 1st March, 1870, but whether barred within four or six years, makes no difference, for complainants, and H. R. Blacklock, discovered this fraud long before the bill was 131
filed in the State Court, in 1869, over ten years before this bill was brought.

And this defense is pleaded.

But it may be said the bill in this case does not charge fraud. If there be no fraud, a suit on the bond cannot be maintained by complainants, only by Robertson, and the Court has no jurisdiction, because it could not have been maintained by Blacklock, the assignor. We contend that it
132 does charge fraud.

The United States Supreme Court, in Burke vs. Smith, 16 Wall., p. 401, says: "True, the appellant's bill al- "leges the indebtedness of the appellees, by force of "their contract. It does not charge a fraud. But it "is plain that, unless the arrangement by which the "subscriptions were merged in that of the City was a "fraud on them, the bill must fail. The Court must set aside "that arrangement, or they cannot recover. And the burden "on them is to establish the fraud. Had their bill been
133 "framed to set aside the arrangement because of fraud, it "must have been held to have been filed too late. The "Statute of Limitation bars action for fraud in Indiana after "six years, and equity acts, or refuses to act, in an analogy "to the Statute. Can a party evade the Statute, or escape in "equity from the rule that the analogy of the Statute will be "followed by changing the form of his bill? We think not. "We think a Court of Equity will not be moved to set aside "a fraudulent transaction at the suit of one who has been "quiescent during a period longer than that fixed by the "Statute of Limitation, after he had knowledge of the fraud,
134 "or after he was put on the inquiry, with the means of knowl- "edge accessible to him."

We therefore, submit that, under no circumstances, has a case for relief been made out against Small; and that any relief complainants may be entitled to could only be against their uncle, Mr. Robertson, whose answer in this case is a melancholy evidence of the effects of the unfortunate civil war.

JAMES SIMONS,
Counsel for Jacob Small, Defendant Respondent.
135 SAMUEL LORD,
Of Counsel.

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CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 148.

EMMA J. BLACKLOCK, MARY BLACKLOCK AND HELEN R. BLACKLOCK, APPELLANTS,

vs.

JACOB SMALL AND ALEXANDER ROBERTSON, APPELLEES.

JURISDICTION.

John F. Blacklock, assignor, at the time of the assignment was a citizen of the State of South Carolina, and continued to be such until this suit was commenced.

Jacob Small, the mortgagor, was a citizen of the State of South Carolina when the mortgage was executed, and when this suit was begun.

Helen R. Blacklock was a citizen of the State of South Carolina when the suit was begun, and Emma Jane Blacklock and Mary Blacklock, the plaintiffs, were citizens of Georgia.

Under the Act of Congress, of March 3d, 1875, it is conceded that the assignees of Blacklock, the mortgagee, could not have maintained a bill to foreclose the mortgage, as their assignor could not have prosecuted a suit in that Court for that purpose. Appellant's Brief, f. 79.

An ingenious attempt is made to escape this conclusion, which is fatal to the jurisdiction of the Court.

It is said:

1st. When a suit is brought to *enforce the contract*, the assignee is disabled, unless it might have been brought in the

Court, if no assignment had been made; but if brought for a tortious taking, or wrongful detention of the chattel, then the remedy accrues to the person who has the right of property or of possession at the time, the same as in the case of a like wrong in respect to any other sort of personal property.

Dishel vs. Dodge, 16 Howard, 631.

Bushnell vs. Kennedy, 9 Wallace, 391.

"If founded on contract, the Court is without jurisdiction. If founded on tort, it has." Appellant's Brief, f. 82.

2. "The fundamental character of this suit is to recover possession and control of specific papers tortiously taken and wrongfully detained."

3. The Court having obtained jurisdiction of the parties and the subject-matter for one purpose, will make its jurisdiction effectual for complete relief.

REPLY.

1st. In so far as plaintiffs seek, by this suit, to recover possession of the bond and mortgage from the defendant, Small, on the ground that they came into his possession by a tortious act, his right of action is barred, as we shall hereafter shew.

2nd. That even if the Court has obtained rightful jurisdiction of the parties and the subject-matter of the action for one purpose, it cannot proceed to adjudicate another subject-matter embraced in the suit, of which it is expressly forbidden to take cognizance.

Its effort "to do complete justice and save further litigation," stops necessarily at the boundary line of its jurisdiction.

3rd. The Court has no jurisdiction over this suit either for the purpose of decreeing specific delivery of the bond and mortgage, or for any other purpose, because if we arrange the indispensable parties on opposite sides of the real matter in dispute, according to the facts, it will be seen that there is but one indivisible controversy between Emma J. Blacklock, Mary Blacklock and Helen R. Blacklock on the one side, and Jacob Small and Alexander Robertson on the other side.

Helen R. Blacklock was not a mere nominal party. The bill asks that the Trustee be ordered to account, that the delivery

of the Confederate notes to the Trustee, by Small, in payment of the bond be disallowed; that Small be ordered to deliver up the bond and mortgage; that he be decreed to pay the amount due, and that the mortgaged premises be sold. It is clear that to the adjudication of all these questions, which constitute a single controversy, Helen R. Blacklock, was a necessary party, that she and the plaintiffs are on the plaintiffs' side of the controversy, and that she is directly interested in the relief for which the plaintiffs ask, and which could not be full and complete unless she was a party. It is, therefore, a suit to which a citizen of South Carolina, is a party on one side, and a citizen of South Carolina, a party on the other, "with interests so conflicting that the relief prayed cannot be had without keeping them on opposite sides of the matter in dispute." It follows that the Circuit Court was without jurisdiction. 121 U. S., 631.

112 U.S. 187

ON THE MERITS.

John F. Blacklock, a citizen of South Carolina, owned a bond of the defendant, Small, for $10,600, secured by a mortgage of real estate, bearing date, 20th March, 1860, and payable in three equal annual instalments. On the *19th March, 1861*, he received from Small, $742, being one year's interest, due on that day. The payment was made in a check on the State Bank, which had suspended specie payment on the 19th November, 1860.

In May, 1861, two months after the above payment, Mr. Blacklock went with his family to England. On the eve of his departure, he assigned the bond and mortgage to his brother-in-law and partner, "Alexander Robertson, in trust for the children of John F. Blacklock."

Mr. Blacklock and his family remained in England until October, 1866. On the *19th October, 1861*, Small paid to Robertson $3,747, being the instalment which had matured on the 20th March, 1861, with interest to date. This payment was made in a check on the same bank, on which a check had been given to Blacklock. On the 4th April, 1862, Small paid to Robertson, by a check on the same bank,

$2,490, being part of the instalment which fell due on 20th March, 1862. When this payment was made, Small asked Robertson if he would receive the last payment. Robertson replied, "*Yes; it came in the right time.*"

Six days afterwards, 10th April, 1862, Small paid again, in a check, on the same bank $5,002, being the balance of the past due instalment, and the whole of the instalment that would become due in March, 1863.

Small swears that up to the time this payment was made, he had deposited in the bank "only good money—gold and the bills that were current of solvent banks," folio 118, and he is sustained by his deposit book, folio 184–185, which shows that the first deposit of Confederate notes, was entered on the 17th February, 1863, ten months after the last payment to Robertson.

The evidence proves that Confederate treasury notes did not become generally current until after these payments had been made. The bank resolutions introduced by plaintiffs, folio 80, shew that on the 7th September, 1861, the banks offered to make further loans of their bills to the Confederate Government, until the treasury notes of small denominations could be provided. This was declined, the Government deeming *the arrangements then in progress*, for the supply of treasury notes sufficient. Mr. Thayer, called by plaintiff, testified that in December, 1861, a considerable amount of currency had reached Charleston. "After that, Confederate notes and bank bills ran parallel in the banks," folio 83.

It was in June, 1862, that the volume of Confederate notes began to affect sensibly the bank deposits, folio 85. In October, 1861, bank bills and Confederate notes were nearly at par with gold, folio 88. In April, 1862, when Small's last payment was made, bank bills and Confederate notes were between five and ten per cent. below par, folio 88. On the 28th September, 1861, a few days before Small made his first payment to Robertson, Mr. Bollman bought £500 of exchange at $5 for the pound sterling, and on the 9th November, 1861, only five months before Small's last payment was made, he bought of the very bank in which Small's money was deposited, £1,000, at a premium of only twenty per

cent. Robertson admits, folio 106, "that he could have sent the money paid by Small to his nieces, but that he made no effort to do so, *because a patriotic feeling restrained him from using this exchange against the public interest.*" Small's checks given to Robertson were deposited by him in the Bank of Charleston, to the credit of the firm of Robertson, Blacklock & Co., folio 104.

There is no evidence to show in what currency Small's checks were paid by the State Bank to the Bank of Charleston. The only evidence we have as to the currency in which the checks of Robertson, Blacklock & Co. were paid by the Bank of Charleston, is to be found in the following testimony of Alexander Robertson, at folio 104.

Q. In what currency were the checks of Robertson, Blacklock & Co. paid by the Bank of Charleston in October, 1861?

A. (*Witness.*) That was after the fall of Sumter?

Mr. Young, counsel for Blacklock: Yes.

A. In Confederate money.

Q. In April, 1862, any change?

A. I think Confederate bills.

It is evident that the witness was testifying as to his belief, and not as to a fact. The only person who could have testified on this point was the person who drew the money.

It is clear, then, that there is not a tittle of evidence to sustain the allegations of the bill that Small had paid his bond to the trustee "in treasury notes of the Confederate States," "in an illegal, unconstitutional and depreciated currency, "payable years after the contingent establishment of the sov- "ereignty and independence of the Confederate States of "America."

As this is the only ground on which the bill asks that the payments made by Small should be disallowed—the bill should be dismissed.

II.

The assignment on the bond, is to "Alexander Robertson, in trust for the children of John F. Blacklock." The nature of the trusts are not defined, nor the duties of the Trustee pre-

scribed. They must be gathered from the surrounding circumstances. What these were, is shown by the evidence. Blacklock, the owner of the bond, was about to take his family, consisting of his three daughters, to Europe; "to avoid the perils of the civil war," which was then flagrant, folio 92. He expected to remain away during the war. On the eve of his departure, he assigns this bond to Robertson. For what purpose? There can be but one answer, to enable him to collect it, and remit the proceeds to his children. In what currency was it to be collected? He knew that all the banks had suspended specie payment, and that there was no hope of resumption while the war lasted. He knew that bank notes had superseded the use of coin, and become the only currency of the country. He had himself received payment of the interest upon this bond in that currency. Is there a doubt, that he expected Robertson to receive payment in the same currency, or that, if this had not been intended, he would have taken the bond with him to England, or left instructions with Robertson, to receive nothing but gold? There cannot be a reasonable doubt, that in receiving payment from Small, in the manner he did, Robertson acted in accordance with the wishes of Blacklock, the creator of the trust, and that if the *cestui que* trusts had been present, they too, would have sanctioned it.

III.

But assuming that Robertson is to be held to the same accountability as any other Trustee, and that he is liable, as for a breach of trust, the question still remains, is Small to be charged as a participant in the fraud? It is conceded that two separate Supreme Courts of South Carolina, based on different principles, and the exponents of opposing theories, have both united in declaring that payments, such as Small made, when accepted by the Trustee, discharged the debtor. And it will be remembered that this was a trust created in South Carolina, that the trust property was in that State, and all the parties to it were her citizens, and bound by her laws.

This, if not conclusive, is certainly a strong circumstance in favor of the defendant.

Appellant's counsel seems to think (f. 38) that this is a question to be decided by United States law. But this is a misapprehension. In matters of this sort the Federal Courts administer the laws of the State, and not of the United States. Their jurisdiction is co-ordinate with that of the State Courts, and in the discharge of their duties they exercise their own judgment as to the meaning and effect of the State laws. It therefore sometimes happens that the State laws are differently interpreted by the Federal and State Courts, and as there is no superior to decide which is right, each Court enforces its own interpretation. To prevent unseemly conflict certain rules have been adopted. One of these is that where, by the course of the decisions of the State Courts, certain rules are established which become rules of property and action in the State Courts, such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves, as authoritative declarations of what the law is. Where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment, as they always do, in reference to the doctrines of commercial law and general jurisprudence. But even in such cases the Courts will lean towards an agreement of views with the State Courts, if the question seems to them balanced with doubt.

107 U. S., 33.

Conceding that this case does not come within the rule, that where a principle of law affecting real estate has been settled by the highest Courts of the State, and has been acquiesced in for a long time as a rule of property, the same rule will be applied by the Federal Courts, is it too much to ask the Court to hold that the question sought to be raised in this case had been "foreclosed by previous adjudications" of the State Courts, extending over a period of fourteen years, when this bill was filed, and that even if it still be open, that it is so "balanced with doubt" that for the sake of harmony, and to avoid confusion, the Court will lean towards an agreement of views with the State Court? Is it too much to ask that the Court will

accept as conclusive the oft-repeated admissions of appellants' counsel, "*that by the law of South Carolina there is no fraud to be discovered*," f. 13, in the transaction of which plaintiffs complain, and that they can only hope for redress under some other law, different from and in conflict with the law of South Carolina.

We think, however, the appellants' counsel errs in supposing that, upon the precise point we are considering, one rule prevails in the State Court and another in this Court.

The case of *Carson vs. McBurney* is the only case arising under the laws of South Carolina which has reached this Court, and the decision in that case was based upon the ground that the transaction assailed was the result of a plot contrived to defraud Mrs. Carson and her children.

Glasgow vs. Lipse, 117 U. S., 327, is the last decision of this Court upon this subject. Two propositions seem to be established by that case.

1st. That a Trustee who receives payment of a well secured debt in depreciated currency, when better currency can be had; unless it can be used in discharging debts, paying legacies, and the like, is guilty of a devastavit and liable to parties injured thereby.

2nd. That a debtor who pays to a Trustee in depreciated currency, a debt payable in gold or its equivalent, *knowing at the time, that the currency is not needed for the payment of debts or legacies, or other uses of the estate, and that the safety of the debt does not require its collection, may be also charged as a participant in the devastavit.*

Now, the Bill in this case does not charge that Small acted fraudulently, or *knew* that the currency was not needed for the purposes of the trust.

The only allegations in the Bill touching Small are, "that he had full knowledge of the trust because of the assignment on the bond and mortgage, and the receipts given to him signed by Robertson, Trustee, f. 9; and that, knowing this, he paid his debt in an illegal, unconstitutional and depreciated currency."

In appellant's argument, f. 15, it is said: "Small *knew* he

was dealing with a trustee." "He *knew* that the money was not legal tender." "He *knew* it was below par."

This is the only knowledge upon the subject which even the ingenuity of counsel can impute to Small. But this is not sufficient. To bring the case within the rule established by Glasgow vs. Lipse, it should have been shewn that Small *knew* the facts stated at f. 4, of appellant's argument, to wit, that the trustee had no debts to pay—that he could not pay the money over to the beneficiaries—that he could make no use of the money—that there were no satisfactory investments to be had.

This has not been done, or even attempted. On the contrary, the proof is that when the last payment was made, Robertson said: "*the money came just in time.*" This could only mean that in some way it could be used for the purposes of the trust, and Small was not bound to enquire further.

The case, as made, rests upon this bald proposition, that payment in depreciated currency to a trustee of a bond executed before the war, and secured by a mortgage of real estate in a besieged city, and liable at any moment to be destroyed by the fire of the besiegers, renders the debtor who makes it, without more, liable as a participant in a breach of trust, and renders the attempted payment absolutely null and void. No decision of this Court has gone to this length. Every case will be found on examination to have been decided on its own peculiar facts, on fraud or want of authority, or some other circumstance connected with the transaction. Not one of them is rested "upon reasons drawn from and upon which the integrity of the republic depends," or on the ground that the recognition of a payment made by a debtor to a trustee, in Confederate notes or by his check on a suspended bank, was "repugnant to the genius of the Government" of the United States. (F. 30 Argument.)

The only question in the case is whether Small participated in a fraud. In answering this question it is necessary to look at the transaction which *then* occurred in the light of the *then* surrounding circumstances.

It may seem now to have been shrewd on Small's part to pay his debt, and unwise on the part of the trustee to receive

payment in depreciated currency, but the same thing was being done daily by the wisest and shrewdest men in the State.

The language used by this Court in another case is peculiarly applicable to this :

"It should be borne in mind, that when the judgments were assigned to Keller, the country was in the throes of a civil war. Lee had not surrendered. Gold and silver, in the currency of the time, were at a high premium. All real property was largely depreciated. The future was uncertain. A transaction which then seemed wise and fortunate, a year later might be deemed greatly otherwise. It is hard to avoid the conviction that the plaintiff's conduct marks the difference between forethought in one condition of things, and afterthought in another."

III.

The receipt of the payment of the bond by the Trustee in depreciated currency was not a void, but voidable transaction.

"That the power of a collecting agent by the general law is limited to receiving for the debt of his principal, that which the law declares to be a legal tender, or which is by common consent, considered and treated as money, and passes as such at par, is established by all the authorities. The *only condition they impose upon the principal if anything else is received by his agent, is that he* shall *inform* the *debtor that he refuses to sanction the unauthorized transaction within a reasonable period after it is brought to his knowledge.*"

Ward vs. Smith, 7 Wallace, 451.

The cases cited by appellant's counsel, folio 16–19, which would seem to establish a different doctrine are inapplicable.

In *Hickman vs. Jones, 9 Wallace, 201,* the words "an absolute nullity," were used in reference to the judgment of a Confederate Court, and so were the words "it was, as if it were not—a mere nullity," cited from Davis vs. Perdicaris, 96 U. S., 195. In Carson vs. Robertson, 99 U. S., 570, the Court was speaking of a transaction tainted with actual moral

fraud. In Fritz vs. Stover, 22 Wallace, the agent's authority had been revoked and his receipt of the depreciated money was therefore held to be a "void act."

That the transaction is voidable, is recognized in the frame of the bill, which prays that the "payment may be disallowed," and "the satisfaction annulled."

It is also recognized in the argument of counsel (f. 82). "*Prima facie, there is no contract remaining.* * * * * * *The payment stands until it is annulled by the Court. The bill asks that it be annulled.*"

"Whenever the act done takes effect as to some purposes, and is void as to persons having an interest in impeaching it, the act is not a nullity, and therefore, in a legal sense, it is not utterly void, but merely voidable."

18 Johns, 515.

Again, a thing may be void in several degrees: "1st. Void so as if never done to all purposes; so as all persons may take advantage thereof. 2d. Void as to some purposes only. 3d. So void by operation of law that he that will have the benefit of it may make it good." *Viner Tit void and voidable, A. pl. 18.*

"A thing is voidable which is done by a person who ought not to have done it, but who, nevertheless, cannot avoid it himself after it is done." 18 Johns, 528.

It cannot be contended that either Small or Robertson could have treated the payment as a nullity. If the money paid by Small had been invested in good securities, which had greatly enhanced in value, there can be no doubt that the children of Blacklock could have followed their money into the investment and claimed it. They had an election therefore, and to say there is a right of election is to say that the act is not absolutely void, for that which is absolutely void is incapable of being confirmed.

The rule as to voidable transactions is that they stand until the party who has a right to question them exercises his elec-

tion, "The authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may be reasonably done after the party with whom that right is optional is aware of the facts which gave him that option, are numerous."

120 U. S., 259–260, and cases cited.

IV.

Statute of Limitations.

A.

So far as the bill seeks to avoid the payment to Robertson, as a fraud upon the rights of the Blacklocks, it is barred by the Stat. of Limitations, which, in South Carolina, bars action for fraud after six years from its discovery.

The cases on this point will be found in appellees original brief, folio 129.

We do not claim that the bond debt secured by the mortgage was barred by the Statute of Limitations. That Statute does not apply in South Carolina to debts of this description. The lapse of twenty years without recognition of the debt by payment or otherwise, raises a presumption of payment. In the present case when the bill was filed, twenty years not having elapsed, the defendant, Small, could not have relied upon this presumption.

Our claim is very different. We insist that, unless the payment made by Small was a fraud on the plaintiffs, the bill must fail. The Court must set aside that transaction, or they cannot recover. Had their bill been framed to set aside the transaction because of fraud, it would have been barred, and they cannot evade the Statute by changing the form of their bill. These are our positions, and they are sustained by the decision in Burke vs. Smith, 16 Wall., 401.

While not disputing the general rule that, by the law of South Carolina, an action of fraud will be barred in six years, Appellants' Counsel contend that a Court of Equity "will not apply the Statute when sound conscience would be

offended by its application." To sustain this position he cites a sentence from *McLure vs. Ashby*, 7 Rich. E. So. Ca., 439 (Appellant's Arg', 37.) It is only necessary to restore the sentence to its context to destroy its value as an authority in support of plaintiffs' contention.

"I take it that the Statute runs at law, from the time the act is done; and that at law it matters not at what time the party injured by the act comes to the knowledge of it. But in matters of an equitable nature—the terms of the Statute not extending to them—this Court is not imperatively bound to apply it—and only applies it by analogy to the practice at law; and then *it does not apply it when sound conscience would be offended by its application.*" But the Court goes on to say: "This matter of fraud is of purely equitable cognizance, and the doctrine of this Court is to apply the Statute thus. In the absence of averment by the injured party, as to the time when the fraudulent act became known to him, the Court assumes that he had notice of the act when it was committed, and therefore holds that the Statute runs from that time—but when, from the circumstances, the Court is persuaded that he came to the knowledge of the act afterwards, the Statute runs only from the time he obtained information."

Such was the law until the adoption of the Code of Procedure in 1870. That abolished all distinctions between legal and equitable proceedings, and provided that "an action for relief on the ground of fraud, in cases which heretofore were solely cognizable by the Court of Chancery, the cause of action in such case not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the law," shall be barred in six years.

This law now applies to both equitable and legal proceedings, and the United States Courts follow the State limitations.

B.

So far as the bill seeks to recover possession of the bond and mortgage it is also barred.

"All actions of trespass *quare clausum fregit;* all actions of trespass *detinue;* actions *sur trover* and replevin, for taking

away of goods and chattels, * * shall be commenced and sued * * within four years next after the cause arises, and not after."

2 Statutes of S. C., 583, § 6.

Code of 1870, Sec. 114. Within six years. * * * "An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property."

"Deshler proceeded by replevin.

The Blacklocks by bill in Equity. Either course is correct." Appellants argument, folio 84.

"Where there is a concurrent remedy in law and equity upon the case made, the limitation is the same in both Courts. Otherwise, a plaintiff by electing his tribunal, may cut his opponent off from a defence to which the law of the land entitles him.

U. S. vs. Daniel, 12 Peters, 56.
Lever vs. Lever, 1 Hill Ch. R. (S. C.,) 64.
7 Johns Ch. R., 111.
3 Brown Ch., 639.

It is immaterial whether Small be regarded as a wrongdoer or a constructive trustee. In either case the claim is barred. Speidel vs. Henrico, 120 U. S., 377.

V.

STALENESS AND ACQUIESCENCE.

This defence meets the complainants *in limine*.

If the transaction between Small and Robertson was subject to any equity on the part of the plaintiffs, the right to such equity has been lost by lapse of time and acquiescence.

In Rolling Mill vs. St. Louis Railroad, 120 U. S., 259, the Court said:

"This matter was reported to the directors. They had a meeting upon the subject some six weeks after the whole

thing had been consummated, and after they had received the benefit of the release by the payment of the drafts. The rule of law upon the subject of the disaffirmance or ratification of the acts of an agent required that if they had the right to disaffirm it they should do it promptly, and if, after a reasonable time, they did not so disaffirm it, a ratification would be presumed. In regard to this it appears that the board, when notified what had been done by their agents, did not disaffirm their action at that time, but that the act or resolution of disaffirmance was passed about two years after notice of the transaction; *and if the suit in this case can be considered as an act of disaffirmance, it came too late, as it was commenced some six months after they had knowledge of the release.*"

The plaintiffs returned to America in October, 1866. Trans., f. 90. They came "for the express purpose of looking up these matters; f. 170. They then discovered that the bond had been paid in depreciated currency, and the money invested in Confederate bonds, ff. 169 and 170. They returned to Europe in 1867. The precise date is not fixed.

It is said that in '1867 they notified Small of their disapproval of the transaction; Argt., f. 6. In support of this, reference is made to fols. 170 and 172, of Trans. The testimony of Mary Blacklock at that place is as follows:

Q. When did you find out the Harleston bond had been paid?

A. I can't give the exact date.

Q. Was it before you went back to Europe?

A. Yes, sir; certainly.

Q. You went back when?

A. In 1867.

Q. Did you at that time make any claim against Harleston?

A. No, sir; against Small we did.

How little reliance can be placed upon the recollection of this witness in fixing dates is shown at f. 171. She is asked why she did not, in 1867, change her residence, so as to give the Federal Court Jurisdiction, and her answer is:

"We were then trying the case against Small in the South Carolina Court."

It is conceded that this case was not begun until 1869.

Emma J. Blacklock and Jno. F. Blacklock were both witnesses. Neither of them testified to this notice having been given. Nor is it mentioned in the answer of Helen R. Blacklock. Transcript, f. 58, which was prepared by the Solicitor who represented the Blacklocks in 1866, and gives a detailed statement of the steps they afterwards took to assert their rights.

No written notice was produced or called for, and it is exceedingly improbable that notice was in fact given at that time. The plaintiffs were acting under the advice of counsel, and were told that by an unbroken current of decisions of the South Carolina Courts, trustees were not only authorized to receive currency in payment of debts, but it was declared to be their duty to do so." Argt., f. 6.

In this state of the law it is not probable that the alleged notice was given. But if it was, it is incumbent on the plaintiffs to fix the date. "In 1867" may mean in December, 1867. Under the ruling in the case just cited it would have been too late, even if the notice had been given early in 1867. They certainly must have discovered the payment by Small in October, 1866. The trustee was their uncle, and is not charged with concealment. Notice of disaffirmance in 1867 was not the "prompt notice" required by the law. We cannot concur in the opinion expressed by their counsel, that prior to 1871 there was not "a fibre of ground for the charge of want of reasonable diligence." We think their right to complain had been lost long before the suit in the State Court was commenced.

In December, 1869, the plaintiffs and Helen R. Blacklock filed their bill for relief in the State Court. An order was made requiring them to give security for costs. Ordinarily the security required is $50. Argt., f. 64. This security they refused to give, not because it was not in their power to furnish it, but because a recent decision of the State Supreme Court rendered it useless to prosecute their claim. Trans., f. 60. "The case was dropped for a time;" f. 171. "An equitable nonsuit was allowed," says counsel, "for the express purpose of avoiding a decision on the merits."

We do not claim that the order made in this case would have supported a plea of *res adjudicata*, but we do insist that the conduct of the parties in "allowing the nonsuit" was a distinct and unequivocal act of acquiescence, based on the best of motives, obedience to the laws of the land, as expounded by the highest Courts of the State of which they were citizens, and to which alone they could then have resorted for redress of their alleged grievances.

In *1878* Mrs. Carson's case was decided by this Court, and in October, 1879, this suit was brought—just thirteen years after, every fact on which their rights depended had been discovered.

After such delay, it is incumbent on the party, who seeks relief in Equity, to "set forth in his bill specifically what were the impediments to an earlier prosecution of the claim, how he came to be so long ignorant of his rights, the means used by the respondents to fraudulently keep him in ignorance, and how and when he first came to the knowledge of the matter alleged in his bill." The reports abound in cases on this point. One is enough.

Badger vs. Badger, 2 Wall., 95.

It will hardly be credited that, in the present case, no attempt even was made in the Bill to explain the delay of thirteen years. It is absolutely silent upon the subject, and might have been demurred to.

In argument, however, an attempt has been made to give a reason for this laches. The reason given is, that these claimants "were instructed, by repeated judicial asseveration from the highest authority of their State, that they had no legal rights," and could not foresee "that the law would be declared otherwise in the Federal jurisdiction."

This is the only excuse suggested for thirteen years of delay. The facts do not sustain the theory.

The plaintiffs, as we have seen, came to South Carolina in October, 1866. They returned to England sometime in 1867. Apart from the disputed notice to Small, in 1867, of their disapproval of the transaction, they took no immediate steps to assert their rights.

At that time the following *Circuit decrees* sustaining the receipt of Confederate notes by trustees had been made.

McLure vs. Steele, XIV Rich. E., June, 1866.
McPherson vs. Lynah, XIV Rich. E., February, 1867.
Pearce vs. Venning, XIV Rich. E., February, 1867.
Adams vs. Latham, XIV Rich. E., June, 1867.

All of these decrees were made by Chancellor Lesesne, and expressed only his individual opinion.

The first decision of the highest State Court was not made until May, *1868*.

The dates at which the decree in McLure vs. Steele was made (June, 1866), shews that there was no stay law in South Carolina which prevented relief in this class of cases until after December 21st, 1866. (Argt., f. 6.)

The dates in the other cases shew that when the plaintiffs returned to Charleston, in October, 1866, and for months afterwards, there was only a single Circuit decree which held that trustees were authorized to receive currency in payment of debts due the trust estate. The "unbroken current of decisions, referred to in argument, were made after the plaintiffs had abandoned their claim against Small, and returned to England."

The proposition that the citizens of a State can be misled by the decisions of "the highest authority of their State, which, under the Constitution of their State, was the oracle of their rights" (Argt., f. 73) has at least the merit of novelty. It assumes that where the Federal Courts differ from the State Courts as to what the State law is on a given point, the Federal Courts are necessarily right, and the State Courts necessarily wrong. But this, as we have already shewn, is founded on a misapprehension of the relation of these Courts to each other. Except in those cases in which Federal questions are involved, supervising jurisdiction over the State Courts has not been given to the Federal Courts by the Constitution and laws of the United States, and even in those cases it must be exercised in the prescribed mode. In other cases the Federal Courts exercise their independent judgment on questions arising in these Courts, but they have never yet undertaken to pronounce the decisions of the State Courts

on the same questions erroneous, though they have refused to follow them. It is admitted that there was no Federal question involved in the decisions of the State Supreme Court, so vehemently assailed, by aid of which those judgments could have been brought to this Court for review on writ of error. How then can this Court say that those judgments of a co-ordinate Court were erroneous?

But even if they could do this, it would not avail the appellants, for whatever may be the law in England or elsewhere, it has been for fifty years the settled rule of this Court, "that mistake or ignorance of the law forms no ground of relief, unless such ignorance has been caused by fraud, imposition, or undue advantage."

Bank of U. S. vs. Daniel, 12 Peter's, 56.

The Court cannot adopt the views pressed in the argument here without encouraging the sordid tardiness induced by speculations of profit from changes of the forum, or of opinions or of persons in the forum, which it has heretofore been the declared policy of all Courts to discourage.

AMOUNT OF RECOVERY.

We do not see how the question discussed in Mr. Young's argument can arise at this stage of the case—and we shall be brief in what we have to say in reply.

In Cruger vs. Daniel, McMullan's E., 197, it was decided (1841) that, in a suit upon a bond, the recovery was limited to the penalty of the bond.

The same point was decided in the same way in Harper vs. Barsh, 10 Rich. E., 154 (1854).

This was the settled law of this State when this contract was made.

"United States Courts, in cases involving contract rights depending on State law, will conform to the settled construction of the law given by the highest State Courts at the time the contract was made.

1 Wallace, 175.
105 U. S., 60.

JAMES SIMONS,
SAMUEL LORD,
For Appellee.

127-96

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SUPREME COURT OF THE UNITED STATES.

EMMA J. BLACKLOCK, MARY BLACKLOCK AND HELEN R. BLACKLOCK, APPELLANTS, 1

vs.

JACOB SMALL AND ALEXANDER ROBERTSON, APPELLEES.

SUPPLEMENTAL AUTHORITIES.

Appellants contend that Bill is for specific delivery of Bond and Mortgage, and cite Broadbent *vs.* Ledward, 11 A. & E., p. 209. 2

This was detinue for pictures by plaintiff, a trustee and a member of a club, and as such, proprietor of the pictures, jointly with other members not made co-plaintiffs. Plea, non detinet, and that the pictures were not the property of plaintiff. *Observe* there was no plea in abatement. The Court say, that in suing on contract the rule has been that all contracting parties must be joined as plaintiffs, and advantage may be taken of the misjoinder without plea in abatement, but not so in actions on detinet. 3

See Morris on Replevin, 3d Edition, p. 125.
DeWolf *vs.* Harris, 4 Mason, 539.
Hunt *vs.* Fitzgerald, 2 Mass., 509.
Freeman on Co-tenants, Section 337.

In Hunt *vs.* Fitzgerald, C. J. Parsons discusses the matter fully.

In the present case, appellants not only shew their joint interest but make Helen R. a party, so defendant Small could not plead in abatement. Having made her a party, her interest is joint, not several or severable. 4

In Ayres *vs.* Wiswall [112 U. S., p. 191], this Court says:

" The suit was brought for the foreclosure of the mortgage,
" and a personal money decree for any balance that might
" remain due on the debt after the security of the mortgage
" was exhausted. The mortgage and the debt it secured
" presented the subject matter of the controversy in the
" case. Ebenezer Wiswall was one of the mortgagors and
" one of the debtors. The relief sought was against him
" and the other defendants. It involved a finding of the
5 " amount due from him and others who were bound
" for the payment of the debt, and in a certain event
" an order for an execution against him personally for the
" collection of the money. The debt was a unit. What-
" ever sum was due from one was also due from all
" who were chargeable with its payment. There could
" not be a decree against a part of the defendants
" for one sum, and against the rest for another. Although
" Wiswall did not contest the amount of the claim of the
" complainants, as set out in their bill, Frederick S. Ayers,
6 " one of the joint debtors, did; and if he succeeds in his de-
" fence it will, of necessity, enure to the benefit of Wiswall.
" The matter in dispute between the parties on the opposite
" side of the suit to enforce the mortgage was the amount
" due on the mortgage debt. The complainants, citizens of
" New York, are on one side of the suit, and Ebenezer Wis-
" wall, also a citizen of New York, and others, citizens of
" Michigan and Ohio, on the other. If the claim of the com-
" plainants is sustained, the decree will be against all the
" defendants. In order that the complainants may get all
" the relief that they ask, and which, upon their showing
7 " in the Bill, they are entitled to, Wiswall is a necessary
" and substantial party to the suit, and on the opposite
" side from them."

Even if complainants could have proceeded without Helen R. they have not done so, and the three stand jointly asking and must jointly derive any relief affordable. The Court would not order the bond and mortgage delivered to complainants in exclusion of Helen R. She cannot be eliminated for the purpose of jurisdiction and retained for relief.

Moreover appellants admit that if this suit be on contract
8 the Court is without jurisdiction, and in their argument as

to the Statute of Limitations confine themselves to contending that there is no Statute of Limitations as to a bond. But if this is a suit, *not* on the bond, but for the specific delivery, even if this Court had jurisdiction for the specific delivery, it is barred by the Statute of Limitations. See argument on behalf of Small, No. 2, p. 13 B.

JAMES SIMONS,
SAMUEL LORD,
For Appellee, J. SMALL.

9

127-96

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1887.

EMMA J. BLACKLOCK, ET. AL.,

vs.

JACOB SMALL AND ALEXANDER ROBERTSON.

ARGUMENT IN REPLY OF APPELLANTS.

JURISDICTION.

The rulings of Dashiel, vs. Dodge and Bushnell vs. Kennedy are not denied, nor are those of Ober vs. Gallagher ; but it is said the rule of the last case does not apply *because*, "although the Court has obtained rightful jurisdiction *of the parties and subject matter* of the action for one purpose, *it cannot* proceed to adjudicate *another subject matter embraced in the suit*, of which it is expressly forbidden to take cognizance,"

Appellee's Sup. Brief, p. 2.

(1) In a word, if the suit embraces *several* subject matters, one of which *is* within and others of which are *out* the jurisdiction, the Court is confined to the determination of the one which is within the jurisdiction. If so, of what use is the rule?

If the Court has jurisdiction of *all* the questions, necessarily *propriore vigore*, it must go on and decide them all. It is only when it has *not*, that the rule is available. Its object and only purpose is to obviate the very difficulty which the appellee supposes will prevent its operation, viz : to enable the Court, because it has jurisdiction *for one purpose*, to retain the case for all within the general scope of the equi-

ties to be enforced, and thus prevent multiplicity of suits and oppressive legislation.

Ch. Jus. Marshall says in Osborne vs. Bank U. S., 9 Wheat, 822--If jurisdiction is once obtained "Then all other questions must be decided as incidental to this, which gives that jurisdiction—These other questions can not arrest the proceedings."

4 Again. The analogy between this proceeding and bills for discovery, where general relief is given, although the right of discovery alone gives jurisdiction, is instructive.

See Story's Eq. Sect. 64 K., to 75, and notes.

Further. The subject matters of the suit are, although distinct in one aspect, intimately connected. The tort is the root of the suit, and gives it its fundamental and jurisdictional character; and it is necessary that it shall be first declared before a right of action accrues on the mortgage
5 or bond.

Suppose it declared; this consequence immediately follows; the bond is due and unpaid. What then?

If the action was *at law*, damages alone could be recovered. *It is in Equity*, because "generally in actions at law damages only are recoverable, and such a remedy must, in many cases, be wholly inadequate." Story's Eq. Sect. 703.

What is Equity to do? Go on and complete the relief necessarily incident to the case made in connection with the parties before it, *or* proclaim its helplessness to do more
6 than order a delivery up of the papers and send the parties to further litigation in other tribunals? Is this Court a "handmaid" to other Courts?

In *fact* and in law, the foreclosure or further proceedings can and will be simply "in addition to, and continuance of"—ancillary to the original suit—and such proceedings are maintainable "without reference to the citizenship or residence of the parties."

Kuppendorf vs. Hyde, 110 U. S., 276.
Christmers vs. Russel, 11 Wall., 82.
7 Jones vs. Andrews, 10 Wall., 331.
Pacific R. R. Co. vs. Mis. R. R. Co., 111 U. S., 522.
Dewey vs. Gas Coal Co., 123 U. S. 333.

Similar reasonings apply to the second jurisdictional point. The jurisdiction is acquired in the case as it stands. Ancillary proceedings are not affected by questions of citizenship or parties, and the controversy is *separable, not single.*

The Relief prayed is the specific delivery of the bond and 8
mortgage to the Plaintiffs, because of the tortious taking and wrongful detention thereof.

The right of action is several, even at law.

Broadbent vs. Ledward, 11 Adol & El., 209.

In equity the beneficial owner is the real owner. This trust was finished; the interests were undivided, but distinct and independent. Each could sue for his own interest.

Pomeroy's Remedies, Sect. 126 and 127.

Cleveland vs. Cohrs, 10 So. Ca. 225.

Two of the three do so. The third does not; she was 9
not a *necessary* party, because the decree on the prayer as made might be pronounced without affecting her interests. The suit being in Equity, she was a proper party, having an undivided interest in the chattel.

All else is "ancillary."

The question reverts to the Rule and its intent and comprehension, where the Court has jurisdiction on one point, etc.

PAYMENT. 10

I. The payment was in Confederate money.

The bank suspensions were on the 6th day of September, 1861. All money transactions after these, deposits, &c., were "with a view to the value of Confederate currency."

Whaley vs. Bank Charleston, 5 So. Ca., N. S., p. 189.

For the testimony relative to this point see Transcript, fols. 82 to 86; fols. 104 to 106, 109 to 110, 125 to 127.

Attention is directed to the case of Opie vs. Castleman, 11
Fed. Rep., Dec. 6, 1887, p. 511, recently decided in the District Court of West Virginia—as almost identical with the one in question.

If payment was *not* made *in Confederate bills specially*, the receipts of the Trustee, under the circumstances, are not a valid discharge of the debt.

Fretz vs. Stover, 22 Wall.
Ward vs. Smith, 7 Wall.

12 "The power of a collecting agent by the general laws (a) is LIMITED to *receiving* for the debt of his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money, *and passes as such at par, is established by all the authorities.*"

The converse is equally true. A party dealing with a collecting agent can only pay in such currency.

Fretz vs. Stover, 207.

If this Trustee was no more than *a collecting agent*, such
13 is the law.

(b) *Moreover* it is general law that although ordinarily the purchaser or mortgagee is not bound to see to the application of the purchase money, it is an obvious exception "that if the mortgagee or purchaser is party to a breach of trust, it can afford him no protection."

Eland vs. same, 4 Mylne. & Cr., 427, Ld. Cottenham.

Perry on Trusts, Vol. 2, Sec. 200, reflects the spirit of the rule thus: "But whatever power and authority the Trustee
14 may have to receive the purchase money, and give valid receipts and discharges, the purchaser will not be protected by the receipt if there was any collusion between them," &c. The law of South Carolina is thus expressed: "A purchaser is not ordinarily required to see to the application of the purchase money where the vendor has power to sell; but *when he knows, or ought to know, that a breach of trust is being commited he cannot shield himself.*"

Salinas vs. Pearsall, 24 So. Ca., 184.

The State Bank had suspended, and was insolvent after
15 the war and did not pay its depositors. Tr. fol. 78 to 79.
Its bills were below par.
They were not legal tender in any form.

By public resolutions of the banks, months before the first payment, the values were regulated with a view to Confederate (revolutionary) currency. The purchaser had full notice of the trust. The debt was amply secured by a real estate mortgage and reasonably safe. The purchaser knew, and says he knew, he could not "have forced it upon Mr. Robertson, if he had not consented to receive it."

The last payments were anticipated. It was notorious 16
that there were no investments open except Confederate bonds or real estate. This money was invested in Confederate bonds. The trustee made no demand for the money. "In Glasgow vs. Lipse, the executor acting under the power conferred by the testator sold the land, and conveyed it by deed to one Speers. After the purchase, Speers died, and Glasgow became, under his will, the executor. In that case *a demand was made* by the executor of Lipse upon Glasgow for the money due the estate, and Glasgow was informed *that the heirs wanted their money, and that they were willing to accept it in Confederate notes*, which had then become the principal currency of the country. In the case 17
under consideration, there was *no demand* made on the debtor for money for distribution among the heirs, nor does it appear that it was needed for any of the uses of the estate, which would require the personal representative to call for payment. We must, therefore, conclude that no legal excuse existed for the action of the fiduciary in accepting as they did the payment of the debt due from Castleman in Confederate money." * * * *

Opie vs. Castleman, p. 515. 18

The attempt "to satisfy a debt so well secured, and when there existed no necessity for its collection, and when he was not required to pay with any other money than that called for in the contract, *savors not only of a fraud, but is an injustice to the heirs of this estate* and should be disregarded. If the personal representatives were not justified in accepting in payment any other money than that called for by the contract, *then clearly Castleman had* no right to 19
pay them in the money he did." Ib. p. 514.

At the time the payments were made the beneficiaries were minors, and in another country.

The breach of trust was glaring. Small must have known it. The facts were such as to excite inquiry. If circumstances such as these do not create collusion in a legal view—constructive fraud—what will?

2 Perry on Trusts, Sect. 814.

20 1 Story's Eq., Sect. 423, and cases cited.

TESTIMONY ON THIS POINT.

E. M. Moreland, broker, says he was a "stock and money broker;" followed that occupation in 1860 and 1861. The banks of the city of Charleston suspended payment "in 1860, or early in 1861." "Can you tell me (Mr. Rutledge) whether the State Bank was among them? Yes, I think
21 so. Q. After the suspension of the banks took place, how did the bank bills of the State Bank rate with gold—were they ever or not received at par? A. They were at a discount in the open market; they might have been received by private parties; they were below par in the open market. Q. Was a bank bill of the 'State Bank' equal with a dollar in gold after the suspension? A. *No; immediately after the suspension they fell about five per cent.* Q. How did they go after that? A. They continued to depreciate. Q. Can you tell me about what the depreciation was in October, 1861? A. In October, 1861, I think it *was about ten per*
22 *cent.* Q. That is as compared with gold? A. It was *between five and ten per cent*, somewhere along there. Q. That is, compared with gold and silver? A. Yes. Did you deal *largely* in those securities? A. Yes. Q. You bought and sold them both? A. Yes."

Transcript, fols. 73 to 75.

X Q. "Are you able to fix the fact to which you have testified, that the bills of this particular bank, viz: the State Bank, fell five per cent. below par? A. The bills of nearly
23 all the banks. Q. But I am asking about this particular bank. What fact have you in your knowledge which en-

ables you to say that immediately after the suspension this particular bank's bills fell five per cent? A. In October, the bills were at five per cent. discount; I can't say about this particular bank—*but I know that they all fell.*"

Trans., fols. 76 to 77.

Mr. William Thayer, Teller of Bank of Charleston:

"Q. Was not the displacement (bank notes with Confederate bills) going on gradually between December, 1861, and June, 1862? Ans. Because the Confederate money and the bank bills were commonly current, but not gold and silver; *but you would have to pay something* for either gold or silver about June, 1862. I don't think there was any distinction made. I merely mention that, prior to December, 1861, the banks had sent a large proportion of their bills in." Trans., fol. 87. 24

"Q. In October, 1861, were other bank bills or Confederate currency at par with gold or silver in the open market? Ans. I don't think that the difference, if any, was of any consequence; I don't think it had affected it materially. Q. But it had some? A. I cannot say. Q. In April, 1862? A. I think it had affected it. Q. Materially? A. It depends very much upon what you call materially; at that time the difference was between five and ten per cent., but I would not call that material then. Q. Why would you call that not material then? A. Because of the plenteous currency that was then in circulation." 25

Trans. fol. 88 to 89. 26

Alexander Robertson—"Q. Did the habit of the Bank of Charleston in paying their checks in Confederate money differ from the custom of other banks? A. *There was nothing else known; if there was any other currency seen, you had to pay a heavy premium to see it.*"

Trans. fol. 105.

"Q. Do you recollect making any particular effort to send this particular money to Mr. Blacklock? A. I am confident I did not; there was such a constant demand on the banks for exchange I did not like to interfere *as a Di-* 27

rector in using this exchange against the public interest; a patriotic feeling restrained me. Q. But if you had asked the bank for exchange you could have got it? A. I would have had to wait my turn. Q. But the bank was selling exchange on England? A. *At two hundred per cent.* Q. When do you think exchange was two hundred per cent.?
28 A. I don't know but that it may have been three hundred; I recollect sending Chisolm some which cost two hundred. Q. What time? A. I don't recollect; Mr. Lord. Your books will show that the 30th December, 1862, is the date."

Trans. fol. 106 to 107.

According to Bollmann, Trans. fol. 122 to 124, the average premium on exchange was 15½, usual premium 9½.

Depreciation of currency, 6½; excess of premium over
29 usual premium.

In October, 1866, it was some 6½ depreciation.

AS TO IGNORANCE OF LAW EXCUSING NO ONE.

The proposition of law the plaintiffs insist on in this case is, wherever a person acts or is *restrained from acting by misdirection of law*, which misleads him into the belief that he has no rights whatever in the premises, *such omission to*
30 *act cannot be charged against him on a question of laches*, for the purpose of preventing him from asserting his rights when he discovers the mistake so as to bar relief in Equity.

In case of mistake of fact there is no doubt.

1 Story's Eq. Juris., Sect. 140, Note 13, Edit. (Bigelows) 1886, page 154.

In case of mistake of law under such circumstances as those before us, there is equally little doubt.

The result of the law is fully stated in Snell vs. Insurance Co., 98 U. S., p. 90–92, and in Story's Eq., Sect. 138 and notes, and in Sect. 111, (p. 118–154).

31 Judge Story states the law to be, "It may be safely affirmed upon the highest authority as a well established

doctrine, that *a mere naked mistake of law, unattended with any such special circumstances as have been above suggested*, will furnish no ground for the interposition by a Court of Equity; and the present disposition of Courts of Equity is to narrow rather than to enlarge the operation of exceptions." (Sect. 138 and cases cited).

What are such special circumstances as will take the case out of the iron rule. 32

Snell was not chargable with negligence because he relied "upon the larger experience and greater knowledge *of the Insurance agents* in all matters," &c. There was no element of fraud or "an intention to mislead or entrap," yet he was relieved. (Snell vs. Insurance Co.)

If there had been a plain mistake of the law by an *arbitrator*, that would of itself, in many cases have been a ground of relief.

Corneforth vs. Geer, 2 Vern., 705.
Redont vs. Pain, 3 Atk., 494. 33
1 Story's Eq., Sect. 125, note.

"When a person by mistake of law acts to his detriment, *under what may be called compulsion*, though compulsion might of itself be lawful, he will be entitled to relief, especially if the other party knew that in the particular case the law did not entitle him to the benefit; and this too, though the injured party at the time was seeking to discern what the law was."

1st Story's Eq. Sect, 111, p. 121, note. 34

"We can see no reasons of justice or public policy why, if he by a mistake of his rights returns to the assessors as liable to taxation property which by law is exempt, he should be thereby estopped to claim a reasonable abatement, and compelled to pay more than his just proportion of taxes."

Charlestown vs. Co. Coms., 109 Mass., 272.

"When a party acts or agrees in ignorance of any title in him, or upon the suggestion of a clear title in another," 35
* * * * "the party seems to labor in some sort under

a mistake *of fact as well as of law.* He supposes, *as a matter of fact,* that he has no title, and that the other party has a title to the property."

1 Story's Eq., 130–137, etc.
Dunlop vs. Ball, 2 Cranch. Supra. Argt., fol. 76 to 79.
Marsh vs. Whitman, 21 Wall.

36 Are not the pronunciamentos of two Supreme Courts stronger to mislead than the representations of an insurance agent or the decisions of an arbitrator? Is it not parallel to the moral "compulsion" spoken of in Charlestown vs. Co. Coms.? Was not, moreover, the mistake of these parties a mixture of fact and law?

Further, does the doctrine in question apply *at all* on the point of "laches?"

37 "With regard to the objection that the mistake (if any) was one of law, and that the rule "*ignorantia juris nemenem excusat*" applies, I would observe upon the peculiarity of this case, that the ignorance imputable to the party was a matter of law arising upon the doubtful construction of a grant. *This is very different from the ignorance of a well known rule of law.* And there are many cases to be found in which equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such a mistake. Therefore, although when a certain con-
38 struction has been put by a Court of Law upon a deed, it must be taken that the legal construction was clear, *yet the ignorance before the* decision of what was the true construction *cannot, in my opinion, be pressed to the extent of depriving a person of relief on the ground that he was bound himself to have known beforehand how the grant must be construed.* * *

It was further argued for the respondent that the appellant was barred from relief by acquiescence, which might be implied from length of time. * * * Now there
39 can be no doubt that acquiescence, to operate as an equitable estoppal, must be with knowledge that the party ac-

quiescing has a right which would be available against that which he has permitted to be enjoyed."

Earl of Beauchamp vs. Winn, L. R. House of Lords, Vol. VI, pages 233 and 234, Ld. Chelmsford.
1st Story's Eq., Sect. 140, page 154.

The plea of this doctrine in this case is not to protect a party in a right, but to prevent a party from asserting a right. The general law is based on the theory of ignoring the question of right *and barring the remedy.*

Is not there sufficient *equity* in such circumstances as these to prevent such a catastrophe?

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